No. 346

Supreme Court of the United States

OCTOBER TERM, 1956

WILLIAM H. BLACK and RUTH E. BLACK,

Petitioners

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; F. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES; infants under the age of twenty-one years, by Lois L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH; Co-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AUGUST, 1956.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, William H. Black and Ruth F. Black,[1] pray that a Writ of Certiorari issue to review the judg-

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[1] Throughout this Petition, "petitioner" when used in the singular refers to William H. Black, who is the only petitioner whose actions are presently involved in the case and is the only petitioner against whom the court below said respondents would be entitled to judgment (Appendix, p. 68).

Petitioner prevailed below as to one appellant, McBride, on the individual causes (Appendix, pp. 62-63), and as to the co-receivers on all corporate causes (Appendix, p. 64). McBride and the co-receivers are listed as respondents solely because the judgment of the Court of Appeals (Appendix, p. 82) reverses the trial court without setting forth separately the portions of the litigation in which petitioner prevailed. Therefore, in this Petition "respondents" refers to the individuals who prevailed in the court below.

ment of the United States Court of Appeals for the Tenth Circuit entered on May 4, 1956 (Appendix, p. 82). The judgment by a divided court (Chief Judge Phillips dissenting in part) reversed findings of fact and the judgment of the United States District Court for the District of Kansas in favor of petitioners (defendants in the District Court) dismissing the causes. The Court of Appeals remanded the causes with instructions for the District Court to determine the amount each respondent was to recover from petitioner.

The litigation involves three separate actions, in which federal jurisdiction can be founded solely in diversity of citizenship, which were consolidated for trial in the District Court. Two of the actions held to be spurious class actions under Rule 23(a)(3) of the Rules of Civil Procedure—in which numerous of the respondents were permitted to intervene without alleging or meeting federal jurisdictional requirements—charged that the complainants suffered losses through fraudulent representations made by an alleged agent of petitioner in the course of a business venture.

OPINIONS BELOW

The District Court's findings of fact, conclusions of law, and judgment (Appendix, p. 1) are not reported. The opinion of the Court of Appeals for the Tenth Circuit entered November 25, 1955 (Appendix, p. 20, dissenting opinion at p. 47), and withdrawn May 4, 1956 (Appendix, p. 49), is not reported. The new opinion of the Court of Appeals (Appendix, p. 50, dissenting opinion at p. 69) is reported at 234 F. 2d 12.

JURISDICTION

The first judgment of the Court of Appeals was entered November 25, 1955 (Appendix, p. 49). Petition for Rehearing was filed December 15, 1955 (R. 2413). On May 4, 1956, the Court of Appeals withdrew its opinion, vacated its judgment, entered a new judgment and delivered a new opinion (Appendix, pp. 49, 50, 82). Petition for Rehearing, filed May 24, 1956 (R. 2522) was denied June 19, 1956 (R. 2565). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. A question presented is whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervener or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship.

2. After a trial consuming close to a month, in which the court heard over 35 witnesses including petitioner (defendant in the trial court), who testified for a full week, the trial court made findings of fact in favor of petitioner on the key issues involved. The second question presented is whether the Court of Appeals, in overturning these carefully documented findings in the face of Rule 52(a) of the Federal Rules of Civil Procedure, and then proceeding on the basis of its own factual determinations to misapply substantive law, so disre-

garded the rules of appellate review and the function of a Federal Court of Appeals as to require reversal by this Court.

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Article III, Section 2, of the Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, . . . between Citizens of different States; . . ."

Rule 23(a)(3) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Rule 23. Class Actions
>
> "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is . . .
>
> * * *
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Rule 52. Findings by the Court
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court

shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

STATEMENT

There were three actions in the courts below, consolidated for trial and appeal, all alleging in essence that petitioner was engaged in a conspiracy to defraud. The actions were brought by alleged victims of this conspiracy as follows:

(1) In the Federal District Court in Kansas by Amen, a citizen of South Dakota, on behalf of all stockholders of the Black-Marshall Oil Company (Black-Marshall), an Illinois corporation, against petitioners, citizens of California, Black-Marshall, and several others.

(2) In the Kansas state court by Amen and five other former stockholders of Black-Marshall, also on behalf of all stockholders, against petitioners, Black-Marshall and several others. This case was removed by petitioners to the Federal District Court in Kansas.[2]

(3) In the Federal District Court in Kansas by the co-receivers for Black-Marshall (who also intervened in the foregoing suits) against petitioners.

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[2] The case was removed without objection, although five of the plaintiffs were Illinois citizens and defendant Black-Marshall was an Illinois corporation. In this regard, the petition for removal had stated that the corporation had not yet been served and that there was therefore diversity of citizenship between plaintiffs and defendants upon whom service had been obtained (R. 37-38).

In the first two actions many other former stockholders of Black-Marshall were permitted to intervene without being required to allege or meet federal jurisdictional requirements, and the co-receivers in the third action were permitted to intervene in these two actions.

The claimed fraud was: *as to the individual plaintiffs,* that in 1944 and 1945 petitioner and one Ives, through fraudulent representations, induced respondents to sell their Black-Marshall stock to petitioner at $10 and $12 a share, an amount less than the value of the stock or the pro rata portion of the assets represented by such stock, that petitioner at the time had an assured sale at a higher price for all the stock or assets of Black-Marshall, and that the stock was later sold at a higher price to the National Cooperative Refinery Association (NCRA); *as to the individual plaintiffs on behalf of the corporation and as to the co-receivers,* that petitioner caused to be issued to himself some 32,000 shares of Black-Marshall stock for no consideration, which shares were sold to NCRA in 1947. (In the trial court, respondents asserted that the value of their individual recovery should be in excess of $1,000,000, and that the value of the corporate cause relating to the 32,000 shares also exceeded $1,000,000 (R. 98-99, 108-109).)

The causes of action were tried without a jury before Hon. Delmas C. Hill of the United States District Court for the District of Kansas. After a trial which consumed nearly a month during which 37 witnesses testified, and with the benefit of briefs and suggested findings on behalf of all parties, Judge Hill entered his Findings of Fact and Conclusions of Law on April

1, 1954 (Appendix, p. 1). Among these were: that the evidence did not establish that there was any conspiracy by petitioner with Ives or anyone; that the evidence did not establish that Ives was petitioner's agent; that the evidence did not establish that petitioner was guilty of any fraud, practiced any fraud on the plaintiffs, or made any fraudulent misrepresentations to any of the plaintiffs; that plaintiffs received full value when they sold their shares and that the subsequent increase in value of the stock resulted from a successful drilling program and a substantial increase in the price of oil; that the stock received by petitioner on the incorporation of Black-Marshall, including the 32,000 shares, was in consideration of transfer to the company of his interest in valuable oil leases; and that Black-Marshall and its stockholders in June of 1947 ratified petitioner's balancing of accounts with Black-Marshall. Judge Hill thereupon dismissed the actions of the individual plaintiffs and the action of the co-receivers, and ordered judgment entered for the petitioners in all actions.

This judgment was reversed by the United States Court of Appeals for the Tenth Circuit in an opinion filed May 4, 1956 (replacing one by the same court filed on November 25, 1955). The majority of the panel (consisting of Circuit Judge Murrah and District Judge Wallace, with Chief Judge Phillips dissenting on all but one of the factual issues) determined, notwithstanding the trial judge's findings and conclusions, *that as to the individual causes,* petitioner planned the acquisition of the shares, knew of Ives's misrepresentations, concocted a scheme to defraud, and was a constructive trustee holding the proceeds of the 1947 sale of his

own stock in trust for these individuals.[3] The Court of Appeals did not dispute the findings of the trial court that respondents' stock was purchased for its full value at the time of sale and that the later increase in value of the stock came from causes unconnected with any purported misrepresentations made to induce the sale. *As to the corporate causes,* the majority below held that the 32,000 shares issued to petitioner were promotional stock issued "surreptitiously, covertly, and we say fraudulently" to petitioner, but that the corporate action, as such, must fail for lack of standing to sue. Nevertheless, the failure of the corporate claims was held by the court below ("on a theory, which," according to Chief Judge Phillips, "has neither basis in law nor justification in equity" (Appendix, p. 73)) not to preclude the individuals from obtaining redress against the petitioner for the wrong alleged to have resulted to the corporation from the issuance of these 32,000 shares of stock.

REASONS FOR GRANTING THE WRIT

I

IN HOLDING THAT A LITIGANT MAY INTERVENE IN A SO-CALLED SPURIOUS CLASS SUIT IN A FEDERAL COURT "IRRESPECTIVE OF CITIZENSHIP OR AMOUNT CLAIMED" PROVIDED THE ORIGINAL PLAINTIFF IN THE ACTION POSSESSED THE REQUISITE DIVERSITY OF CITIZENSHIP AND JURISDICTIONAL AMOUNT, THE COURT BELOW CAME INTO CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND WITH AN APPLICABLE DECISION OF THIS COURT.

The citizenship of the parties, plaintiffs, and intervenors, is in considerable confusion, probably because,

[3] Chief Judge Phillips concurred in the decision holding petitioner liable to the individual respondents solely on the ground

under the law as conceived below, it was not regarded as important.[4] But two interveners as plaintiffs clearly appear to be citizens of California, as are the petitioners, defendants below. And Black-Marshall, which should be a necessary party in any event, assuming a derivative recovery as allowed by the Court of Appeals, is an Illinois corporation, and so has common citizenship with many of the respondents.

The Court of Appeals brushed aside consideration of jurisdictional defects, saying:

> "The original complaint [i.e., the complaint by Amen alone] alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent in-

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that Ives was petitioner's agent and petitioner was therefore responsible for Ives' misrepresentations. (Appendix, pp. 72-73.)

[4] In the trial court petitioners contested the right to bring these actions as spurious class suits under Rule 23(a)(3). Although they pointed out that the petitions of intervention did not contain any jurisdictional allegations, their argument was directed to the fact that the actions, at best, alleged individual frauds committed by the same person in a different manner and at different times. In the Court of Appeals, petitioners renewed this argument and emphasized that the litigation did not present the type of situation falling within Rule 23(a), and therefore each respondent's case "must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved." (R. 2407, 2494). The jurisdictional issue, of course, is necessarily in the case as it comes to this Court. See, *e.g.*, *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583.

terventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry Co.*, [70] F. Supp. 870; *Dickinson* v. *Burnham*, 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448." (Appendix, p. 52).

This is the whole opinion upon this point. Under the limitations of the Constitution jurisdiction of a federal court is not so easily created. The Court of Appeals for the Second Circuit is explicit on this point, and its decision in *Steele* v. *Guaranty Trust Co. of New York*, 164 F. 2d 387 (2d Cir. 1947), is in direct conflict with the decision below. In the *Steele* case Judges Learned and Augustus Hand and Judge Frank had before them a case in which a complaint had been amended to permit the intervention as plaintiffs of four parties, three of whom could not show the requisite amount, and as to the fourth of which there was not the needed diversity of citizenship. The Court unanimously held that there was no federal jurisdiction as to these plaintiffs. "A proceeding under 23(a)(3) is," said the Court through Judge Frank, "in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." This decision has been followed in *Wagner* v. *Kemper*, 13 F.R.D. 128 (W.D.Mo. 1952), and *Speed* v. *Transamerica Corp.*, 135 F. Supp. 176, 202 (D.Del. 1955).

Similarly the Courts of Appeals of the Seventh

Circuit and of the District of Columbia have declined to follow the rule enunciated in the decision below and have required interveners under Rule 23 (a)(3), in cases other than diversity cases, separately to establish the basis of jurisdiction. *Matlaw Corporation* v. *War Damage Corp.*, 164 F. 2d 281 (7th Cir. 1947), *cert. denied*, 333 U.S. 863; *Knowles* v. *War Damage Corp.*, 83 App. D.C. 388, 171 F. 2d 15 (1948), *cert. denied*, 336 U.S. 914; *cf. McGrath* v. *Tadayasu Abo*, 186 F. 2d 766, 770 (9th Cir. 1951), *cert. denied*, 342 U.S. 832.

The spurious class action is, of course, nothing more than a permissive joinder device. As such, its diversity jurisdiction requirements accordingly should be comparable to those of the usual suits in which many parties are joined. The familiar jurisdictional standards for these actions were considered by this Court in *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583. There, the fact that one of the many plaintiffs suing to enjoin collection of the fees exacted by the California Caravan Act met the jurisdictional requirements was held to be of no aid to other plaintiffs. Without dissent, the Court announced that since the device of joinder simply enables several plaintiffs to assert separate and distinct, though identical, demands in a single suit, it followed that each of the several plaintiffs is bound to establish jurisdiction with respect to his own claim regardless of whether or not other parties have done so and "the suit should be dismissed as to those who fail to show that the requisite amount is involved." (306 U.S. at 590).

Judge Prettyman, in the *Knowles* case, *supra*, discussed the history and reasoning of the spurious class doctrine:

> "This type of action is spoken of as a 'spurious class action'. The members' interests may be several and not interdependent, although the remaining requisites of the true class action must be met. Their joinder is a matter of economy and efficiency on the part of courts and parties—an avoidance of a multiplicity of suits. Courts have possessed the power to afford and have afforded this remedy long before the adoption of the new Federal Rules of Civil Procedure. The joinder was and is a matter of discretion in the trial court. However, both at the earlier date and now, when the interests are separate but a joinder is permitted, each individual claim must equal or exceed $3,000 before the action can be prosecuted in a federal court. When the claims are separate, they cannot be aggregated to surpass this jurisdictional threshold." (171 F. 2d at 18).

The decision below allowing intervention in a spurious class action, without regard to diversity, rests on a theory advanced by Professor Moore a year before the *Gray* case was decided (2 Moore, *Federal Practice* 2241-42 (1st ed. 1938), and resubmitted by him without any attempt to distinguish the effect of the *Gray* opinion (3 Moore, *Federal Practice* 3443-44 (2d ed. 1948)).

The sole authority cited by Professor Moore in his first edition, 2 Moore, *Federal Practice* 2241-42 and n. 24, was *Stewart* v. *Dunham,* 115 U.S. 61, a creditor's bill to set aside a fraudulent conveyance. The reasoning in the *Stewart* opinion itself negatives the extension of the case to a spurious class situation:

"The right of the court to proceed to decree between the appellants and the new parties did not depend upon the difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and *it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree.* If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing." (115 U.S. at 64). (Emphasis supplied).

In a spurious class action, however, as Moore himself recognizes, 3 Moore, *Federal Practice* 3426, 3456, 3465 (2d ed. 1948), *other members of the class are not entitled to the benefit of the decree;* the decision is *res judicata* only as to the original parties and those who have actually intervened. *E.g., Martinez* v. *Maverick County,* 219 F. 2d 666, 672 (5th Cir. 1955); *Kainz* v. *Anheuser-Busch,* 194 F. 2d 737, 742, 745 (7th Cir. 1952), *cert. denied,* 344 U. S. 820; *California Apparel Creators* v. *Wieder of Calif.,* 162 F. 2d 893, 897 (2d Cir. 1947), *cert. denied,* 332 U. S. 816. This distinction between spurious and true class actions is crucial.

In his second edition Professor Moore abandoned reliance on the *Stewart* case, citing instead the holding in *Shipley* v. *Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947). The "bootstraps" nature of this endeavor has not escaped attention. As Professors Hart and Wechsler have observed in their work *"The Federal Courts and the Federal System"* (1953):

> "Professor Moore's principal authority for the view that independent jurisdictional grounds are not needed to support permissive intervention in a 'spurious' class action is the Shipley case, *supra*. The only authority cited in the Shipley case was Professor Moore. . . .
>
> "Is the Supreme Court likely to uphold this use of Rule 23(a)(3) to accomplish so bald an enlargement of federal jurisdiction?" (p. 937).

The baldness of the enlargement of federal jurisdiction is underscored by Professor Moore himself in his discussion of Rule 24(b),[5] upon which rests the court's authority to permit intervention, whether the interveners are many and hence may be called a "spurious class" under Rule 23(a)(3), or are only one or two.

> ". . . where intervention is sought to present a claim or defense in an *in personam* action and the only basis therefor is a common question of law or fact, there is no reason to permit the intervener's rights to be litigated if they could not have been, had the intervener been joined as an original plain-

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[5] "24(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . ."

tiff or defendant. Procedurally it may be very desirable to permit the intervention, but it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements. . . . Procedurally it may be wise for a court to allow intervention and Rule 24(b) does authorize the court to permit intervention where there is a common question of law or fact. But Rule 24(b) is subject to federal jurisdictional limitations, and if intervention were permitted in this case . . . [the intervener] would be permitted to do indirectly what the jurisdictional rules preclude him from doing directly. . . .

"What has just been said about intervention in an *in personam* action is subject to this qualification: no independent jurisdictional ground is needed to support intervention in a class action, even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved. . . . The reason why intervention in the class action, although such action involves only a common question of law or fact, need not be supported by independent grounds is that *because of the numerous persons involved, the utilization of the representative concept is warranted.* But *in the first . . . case* put above where numerous persons are not involved and hence a class action is not warranted by Rule 23(a)(3), *there is no real reason to dispense with the jurisdictional requirements* which . . . [the intervener] would have to satisfy as an original plaintiff." 4 Moore, *Federal Practice* 126-37 (2d ed. 1950). (Emphasis supplied).

Intervention in both spurious class actions and non-class actions is governed by the same Rule 24(b), permitting intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Why Rule 24(b) is subject to federal jurisdictional limitations when intervention occurs in a non-class action, but the same rule is free of such limitations when intervention occurs in a spurious class action is not satisfactorily explained. Nor can it be: Why the removal of independent jurisdictional requirements in non-class actions on grounds of procedural utility and desirability would constitute an undue expansion of federal jurisdiction, but the removal of the same requirements in spurious class actions does not constitute such an expansion is not satisfactorily explained. Nor can it be. Moore's contention appears to be simply that when supposed procedural utility [6] is great enough—as he considers it in the

[6] The true considerations which bear upon procedural utility in connection with intervention are far broader than Professor Moore has recognized:

> "Permissive intervention is largely a matter of trial convenience. It is designed primarily to allow litigants in the federal courts to clear up in a single suit, questions which would ordinarily arise in separate *federal* suits. But there seems to be no reason why disputes which, if originally brought, would have been confined to a state forum should be dragged into the national courts. The purpose of the Rule is to facilitate *federal* practice and not to reduce state litigation as well. The protective function of the court is not called into play since the intervener in permissive intervention will not be prejudiced or bound by the original proceeding. The original suit does not create the subsequent litigation or catch the third person in the cross fire of the main litigants. While it would be convenient to clear up these questions in a single suit, as long as the national courts are courts of limited jurisdiction it does not seem reasonable to throw additional burdens on already crowded dockets merely because controversies normally

spurious class situation—federal jurisdiction may be expanded; when procedural utility is not very substantial—as in the non-class situation—federal jurisdiction must remain within its Constitutional limitations.

But, as this Court has emphatically stated, the matter far transcends convenience or inconvenience. Congress and this Court have consistently recognized the limits on the diversity jurisdiction of the federal courts imposed by the Federal Constitution (Article III, sec. 2, cl. 1):

> "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business. . . . 'The policy of the statute [conferring 'diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy* v. *Ratta*, supra, at 270. In defining the boundaries

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without their jurisdiction are similar or identical in some questions of law or fact to a case properly before them." Campbell, *Jurisdiction and Venue Aspects of Intervention Under Federal Rule 24*, 7 U. of Pitt. L. Rev. 1, 10-11 (1940). (Emphasis in original).

of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy." *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 76-77.

As we have stated, the citizenship of the interveners is in considerable confusion. None of them alleged their citizenship and only a few their residence (R. 20, 25, 26, 29, 30, 46, 51, 52). They made no request for findings of fact regarding their citizenship (R. 93).[7] And the trial court made none (R. 116). But out of the obscurity, one can discern that two parties aligned as plaintiffs in both the individual actions, Kenneth and Hazel Constant, appear to be citizens of California and so lack diversity with petitioner Black, and that twenty-five or more parties-plaintiff seem to be citizens of Illinois; the state of incorporation of Black-Marshall Oil Company.[8] The determination of fact regard-

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[7] The only finding with respect to citizenship requested by respondents was that the original plaintiff, Amen, was a resident and citizen of South Dakota (R. 93-94). As the majority below recognized, Amen was one of the respondents who had no dealings whatever with Ives, much less with petitioner Black, but instead bought and sold his Black-Marshall stock through another respondent, Danford. (Appendix, p. 62). Apparently, Amen was the only member of the alleged class who was in a position to allege diversity of citizenship with both petitioner Black and Black-Marshall.

[8] Black-Marshall was dissolved under Illinois law on July 1, 1947 (R. 2313). The dissolution was set aside, however, on October 18, 1949, when the United States District Court for the Southern District of Illinois on motion of respondent Amen ordered the appointment of co-receivers (R. 1510-12). In its first opinion, the Court of Appeals recognized this order setting aside the dissolution of Black-Marshall as valid and invulnerable to attack (Appendix, p. 35).

ing citizenship plainly requires further proceedings in the District Court under proper instructions from this Court.

Furthermore, viewing the case as resolved by the majority below in its second opinion, all pretense of federal jurisdiction disappears. The majority below held that the co-receivers' action on behalf of the corporation must fail. It then—in disregard of the applicable substantive law as shown in Chief Judge Phillips' dissent—allowed what is in effect a derivative recovery by respondents through Black-Marshall on the 32,000 shares of stock issued to petitioner. (See Point II, below at pp. 28-32). If this recovery is permitted to stand, then Black-Marshall should remain a party-defendant and the corporation's common citizenship defeats federal jurisdiction as to a large group of respondents.[9] The respondents cannot have it both ways. They cannot recover for and through the corporation for acts in which the corporation participated and at the same time deny that the corporation is a necessary party-defendant in the proceeding.

But whatever the final resolution of the effect which any derivative recovery has on the question of federal jurisdiction, it is plain that upon the present state of

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[9] The motion of the intervening co-receivers to dismiss Black-Marshall as a defendant was apparently granted (although the printed record is not clear) despite the fact that a major claim was a derivative action to cancel shares of Black-Marshall stock, a proceeding which has traditionally required that the corporation be joined as a defendant. See, *e.g.*, *Venner* v. *Great Northern Railway*, 209 U.S. 24; *Doctor* v. *Harrington*, 196 U.S. 579, 587; *Davenport* v. *Dows*, 18 Wall. 626.

the record there was error below in assuming jurisdiction and that the judgment of the Court of Appeals should be reversed and the cause remanded for further proceedings in accordance with the instructions of this Court.

II

THERE IS A COMPELLING NEED FOR THIS COURT TO SPEAK FIRMLY ON THE DEPARTURE FROM THE REQUIRED STANDARDS OF APPELLATE REVIEW SHOWN IN THE COMPLETE DISREGARD OF FINDINGS MADE AFTER A MONTH-LONG TRIAL IN WHICH THE TRIAL JUDGE HEARD THE TESTIMONY OF PETITIONER AND MORE THAN THIRTY-FIVE OTHER WITNESSES.

It requires no detailed examination of the record in this case to demonstrate that the court below completely disregarded the standards of appellate review required under Federal Rule 52(a) and enunciated in the decisions of this Court. So glaring a departure from required appellate standards should not be permitted.

As has been seen, the individual respondents alleged that petitioner Black was guilty of a conspiracy to defraud them of the full value of their stock by procuring their stock for less than its value and less than the amount which they charged he then knew would later be obtained on a sale of the stock or assets of Black-Marshall to an assured purchaser.

The trial of these charges of fraud consumed close to a month. Petitioner Black took the witness stand for a full week. He presented to the court the complete story of what took place and of his part in it. The

Court heard the testimony of more than 35 other witnesses. There was a square conflict between the testimony of petitioner Black and that of Ives, the individual who was found by the court to have made misrepresentations to respondents; and that of Sherrard, who was originally named as a party defendant and then was dismissed on the motion of the plaintiffs and allowed to join as in intervening party-plaintiff. In contrast to petitioner Black, Ives did not take the stand. Not only did Ives fail to take the stand, but his testimony in the three depositions received differed so markedly as to show unequivocally that he could not be telling the truth on all occasions.

The trial court performed what is peculiarly its function under our judicial system. The trial judge resolved conflicts of testimony, and made his decision as the trier of the facts. He saw, heard and believed petitioner. He found explicitly that petitioner was not guilty of any conspiracy to defraud and in fact had no knowledge at the time respondents' stock was purchased for its then full value that Ives had misrepresented any facts to respondents, or that the stock would subsequently become more valuable than at the time respondents sold their shares.

The majority of the Court of Appeals simply ignored these findings and substituted its own findings of fact as it would on a trial *de novo*. This plainly violated Federal Rule 52(a) and the fundamental principles which this Court has said must apply in this area.

As *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596, makes clear, it is not the function of an appellate court to try a case *de novo* on a cold record

where the attack on the trial court's findings is only a dispute as to the proper inferences to be drawn from the evidence in the record. The mandate of Rule 52(a) is that an appellate court must not set aside findings of fact "unless clearly erroneous"; under this explicit requirement, it is not enough that an appellate court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *Real Estate Boards,* 339 U.S. 485, 495-496; see also *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342. This Court has emphasized in *Walling* v. *General Industries Company,* 330 U.S. 545, 550, where it held that a Court of Appeals cannot reject findings of a district court on the ground that there was conflicting testimony, that:

> "The District Court heard the witnesses, and was the proper judge of their credibility."

That this is an axiom which must be followed in judicial review was cogently put by Judge Learned Hand in *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 433 (2d Cir. 1945):

> "However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has; and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.' Davis v. Schwartz, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289; Adamson v. Gilliland, 242 U.S. 350, 353, 37 S.Ct. 169, 61 L.Ed. 356; Alabama Power Co. v. Ickes, 302 U.S. 464, 477, 58 S.Ct. 300, 82 L.Ed. 374. The reason for this

is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. Morris Plan Industrial Bank v. Henderson, 2 Cir., 131 F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

These settled principles meant nothing to the majority of the Court of Appeals. Insofar as the majority below was concerned, there might as well not have been any decision by the trial court. As is apparent from the following representative illustrations, the trial court's findings of fact were simply disregarded.

Thus the trial court, after first setting forth in careful detail the events which occurred from the time petitioner Black first came into contact with any of the respondents, made the following specific findings of fact:

That, in connection with the misrepresentations made by Ives in 1944 and 1945, "[t]hese misrepresentations were made by Ives without solicitation by Black and without Black's knowledge" (Find-

ing VII, Appendix, p. 10; Finding VIII, Appendix, p. 13);

That the first notice Black received of Ives' misrepresentations came in late 1945 after respondents had sold their stock (Finding X, Appendix, p. 14);

That the value of the Black-Marshall stock at the time respondents sold their shares in 1944 and 1945 did not exceed the prices which they received (Finding XIII, Appendix, p. 16);

That the increase in value of Black-Marshall stock following the time of the sales of their shares by respondents came as a result of the successful drilling program by the Company which resulted in 146 producing wells, which increased the Company's production during the period when the price of oil rose markedly (Finding XIII, Appendix, p. 16).

All of these findings were supported by the trial court's detailed citation to testimony of petitioner Black and other witnesses, as well as to supporting documentary evidence. They form an unassailable foundation for the trial court's conclusion that the evidence did not establish any conspiracy between Mr. Black and Mr. Ives or anyone else and that the evidence did not establish that Black "was guilty of any fraud, practiced any fraud on the plaintiffs, or made any fraudulent misrepresentations to any one of the plaintiffs" (Conclusion VII, Appendix, pp. 18-19). It is clear that in making these basic findings and in awarding judgment to petitioners the trial court accepted Black's testimony and rejected the inconsistent testimony of Mr. Ives and Mr. Sherrard.

In the face of these findings, which necessarily should have been respected under Rule 52(a) and the principles enunciated by this Court, the court below concluded that in May or June of 1944 Black found a market for respondents' stock "in pursuance of a definite plan to eliminate the large family of stockholders" (Appendix, p. 58) and purchased half of respondents' stock in 1944 and the other half in 1945 "in consummation of what we hold to be Black's scheme to defraud" (Appendix, p. 62).[10]

After making these unwarranted findings in complete disregard of those made by the trial court, the court below was then led to adopt a heretofore unknown interpretation of the law of fraud and unjust enrichment under which it held petitioner liable. Disregarding applicable Illinois law, the court below held that petitioner was liable to respondents for the increased value of their stock in spite of the undisputed fact that respondents had "received the full value of their stock" when it was sold (Appendix, p. 61). This unique holding clearly disregarded an essential element, in equity as well as in law, of a cause of action for misrepresentation—that the plaintiff must have been damaged in reliance upon the misrepresentation. See *Roda* v. *Berko*,

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[10] In thus usurping the function of the trial court to resolve conflicts in the testimony, the court below stated that the "record is barren of any benefits to Ives" (Appendix, p. 60), apparently to suggest that his representations were made for petitioner Black's benefit. The fact is that after the sale of stock by respondents in 1945, they re-invested their initial investment in Black-Marshall, plus the substantial profit they had made thereon, in a new venture *formed by Ives* and known first as Dale G. Ives Interests and later incorporated as the Aledo Oil & Gas Company, with Ives as its

401 Ill. 335, 81 N. E. 2d 912, 914 (1948); *Finn* v. *Monk*, 403 Ill. 167, 85 N. E. 2d 701, 706 (1949). Thus, had Black, contrary to the District Court's considered finding, conspired with Ives to misrepresent the facts concerning the sale of Black-Marshall's assets, the respondents could not complain, for they were in no way injured. [11]

Another typical instance of failure to adhere to the proper limits of appellate review is seen in the treatment by the majority below of the District Court's findings of fact in the suit brought by the co-receivers against petitioner Black. The trial court found that all 122,500 shares of common stock issued by Black-Marshall were issued in exchange for the five Kansas leases (Finding VI, Appendix, p. 6). It also made the unequivocal finding of fact that:

> Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually,

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first president. (R. 501, 945-946, 1503-1504, 1696, 1499-1500).

Typical of the disregard of the trial court's finding and the *de novo* consideration by the court below is its treatment of respondent Hall. The court concluded that she was entitled to recover (Appendix, p. 62) even though she could not testify of her own knowledge to any misrepresentations or that she had been induced to sell her stock. (R. 596-597, 599, 601).

[11] The absence of injury to the purportedly defrauded parties readily distinguishes the instant case from those relied upon by the Court of Appeals, such as *Dunnett* v. *Arn*, 71 F.2d 912 (10th Cir. 1934) and *Falk* v. *Hoffman*, 233 N.Y. 199, 135 N.E. 243 (1922). All such cases concerned plaintiffs induced to sell their stock at a price *lower* than its *true value*, when the buyer knew at the time that the same shares, or the corporation's assets, could be sold to yield a *greater price*. In fact, no sale of all the stock or assets of Black-Marshall could have been made in 1944 and 1945 to realize as much as the price received by respondents (R. 1171, 1208, 1226, 164, 311, 1175, 1190-1191, 1126, Ex. K-3, R. 2293).

and were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original Kansas leases." (Finding VI, Appendix, p. 7).

These findings of fact were supported by detailed references to testimony and to the documentary evidence. In brief summary, this evidence showed that the issuance of the shares, including the 32,000 shares in issue here, is set forth in the original incorporation minutes (R. 1718-1720). The issuance is also set forth in the minutes of the first meeting of the board of directors, at which the Aledo group, including the respondents, had a majority (R. 1722-1723). It was covered in the stock book (R. 1559-1563). A recital of the total shares issued for the original five Kansas leases was contained in every annual audit report of the company which was read at the directors' and at the stockholders' meetings (R. 1786-1800). In addition to this detailed documentary record there was full testimony by Black that the five leases were transferred for the full 122,500 shares including the 64,870 shares which were carried as Black et al. and were issued jointly to Marshall and him (R. 1287-89, 1479-80, 1206, 1291, 1157, 1192). Moreover, Marshall sold his half of such shares to the corporation at a time when respondents were well represented by membership on the Black-Marshall board of directors and pursuant to a resolution of the stockholders, including respondents (R. 1768-1770, 1795, 1796-1799).[12]

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[12] As Chief Judge Phillips points out in his dissent, the majority below incorrectly refused to give effect to the Kansas statute of limitations which barred the derivative action. The facts leave

Once again, the majority below, in the face of these explicit findings of fact made by the trial court after a month-long trial, makes diametrically opposed factual findings and states, "the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common . . ." (Appendix, p. 66), and goes on to say, with respect to the 64,870 shares, of which some 32,000 were issued to Black, "it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black" (Appendix, p. 67).

After this departure from what the record shows and the trial court found in fact occurred, the majority below was forced once more to reject settled legal doctrine in order to enhance the respondents' ultimate recovery by ordering the cancellation of petitioner Black's 32,000 shares. As has been indicated, in the derivative action the respondents attempted to recover on behalf of Black-Marshall for injuries allegedly resulting to it from the issuance of the 32,000 shares without consideration. On an unprecedented theory which reflects a complete failure to attempt to determine applicable law, the majority of the court below

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little room for doubt that certainly by 1944, five years before suit was brought, respondents knew of the issuance of the shares to petitioner Black and had recognized that the shares were validly issued in consideration for the transfer of the Kansas leases. The applicable Kansas statute, *Kan. Gen. Stat.* § 60-306 (1949), bars a suit for fraud unless brought within two years after discovery of the fraud. This limitation has been construed as requiring suits to be brought within two years after discovery of such facts as would on reasonable inquiry or investigation lead to knowledge of the fraud. See *Woodward* v. *Kendall*, 172 Kan. 332, 239 P.2d 924 (1952); *City of Coffeeville* v. *Metcalf*, 134 Kan. 361, 5 P.2d 807 (1931).

invalidated these shares, which the District Court had found as a fact were properly issued to Black, and required the distribution of their total value pro rata over the remaining "valid" shares of Black-Marshall. Thus, recovery was awarded directly to the respondents, no longer stockholders, on a cause of action derived from the corporation and whose fruits could lawfully accrue only to the corporation.

Here again, the disregard of the requirements of Rule 52(a) had the chain effect of leading to basic errors of substantive law. In achieving them the majority of the court below was persistent, ingenious and, as regards legal principles, wholly original. In its first opinion (filed November 25, 1955) the reasoning was as follows:

(1) The former stockholders of Black-Marshall are without standing to sue on behalf of the corporation, since they do not seek to set aside the sale by petitioner to NCRA of his Black-Marshall shares, but to confirm it, and impress a trust on the proceeds of the sale. They are not claiming to be legal or equitable stockholders of the corporation, so far as this action is concerned, and may not act for the corporation.

(2) However, the co-receivers have standing to sue on behalf of the corporation for a wrong to the corporation.

(3) Petitioner, contrary to the findings of the District Court, committed a wrong against the corporation in obtaining some 32,000 shares without consideration.

(4) The co-receivers may, therefore, recover from petitioner for the corporation the proceeds of the sale of what were, in law, unissued shares.

But, on reconsideration of the case after petition for rehearing had been filed, the court realized that what it had done was to require petitioner to pay back the proceeds of the sale for the benefit, in large part, of the purchaser of the shares and majority shareholder, NCRA. See second opinion, Appendix at pp. 63-64.

So the majority withdrew this highly unsuccessful effort, and tried again. This time the progression of ideas went as follows:

(1) As in the prior opinion, the former stockholders, for the reasons given before, do not have standing to sue on behalf of the corporation.

(2) And while the co-receivers may have capacity to maintain the suit, it would be inequitable to permit them to do so, since NCRA would be the principal beneficiary of their success.

(3) But petitioner, contrary to the finding of the District Court, by having stock issued to him without consideration, committed a wrong against the former stockholders, not against the corporation as the first opinion said. This wrong consisted in obtaining 32,000 shares of stock which should not have been issued, and the proceeds of the sale of such shares to NCRA should therefore have gone pro rata to the other stockholders and not to petitioner.

In short, after holding "that the corporate claims must fail for lack of standing to maintain the suit and for want of equity on the part of the beneficiaries in any corporate recovery," (Appendix, p. 64) the court below simply went on to allow the individual respondents to recover for the alleged wrong to the corporation.

To achieve this conclusion the court entirely reconstructs the negotiations and agreements between the parties as found by the District Court. This is rigorous but, at least, it produced the desired answer. But an inescapable difficulty remains. The 32,000 shares of stock were issued to petitioner. Petitioner either gave consideration for them or he did not. If he did, they are rightfully his. If he did not, the wrong resulted not to the stockholders but to the corporation.[13] Whatever form of words the court below used to describe the alleged wrong committed by petitioner, the law of Illinois, as of other states, is clear on this point.[14] In

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[13] If, contrary to the settled and controlling law, it be assumed that the claim for disallowance of the 32,000 shares was not one which had to be asserted by or on behalf of the corporation, there was nonetheless no basis whatever for the Court of Appeals to have awarded such relief to the individual respondents. The plain fact is that the only claims asserted below with respect to the 32,000 shares were, first, a claim by the co-receivers purportedly acting for the corporation, and second, a claim by the individuals in the nature of a stockholder's derivative action. The Court of Appeals explicitly held that both of these claims must fail. It then went on to decree what amounted to cancellation of the 32,000 shares in the action brought by the individual respondents based on the alleged fraudulent misrepresentations, in which there were no allegations relating to the 32,000 shares and in which no relief was sought as to these shares. Accordingly, on this record there is no basis for the court to have cancelled the 32,000 shares for the advantage of these individuals. This basic jurisdictional shortcoming is not answered by the simple statement of the majority below that "it will not be restrained by mere forms of action or niceties of pleadings" (Appendix, pp. 64-65).

[14] A wrong committed against a corporation does not result in any right of action in a stockholder. Such a wrong creates only a right of action in the corporation. Only if the corporation fails to act may the stockholder bring suit, and even in such cases the stockholder acts solely for the corporation in a derivative suit. Most important, any recovery is for the exclusive benefit of the corporation. See *Bingham* v. *Ditzler*, 309 Ill. App. 581, 33 N.E. 2d

Voorhees v. *Mason*, 245 Ill. 256, 91 N.E. 1056, 1059 (1910), directors charged with issuing stock to themselves without consideration were required to account to the corporation, not to shareholders bringing suit. See also *Chicago Macaroni Mfg. Co.* v. *Boggiano*, 202 Ill. 312, 67 N.E. 17, 20 (1903). The Court of Appeals majority was therefore clearly in error when it permitted the individual respondents to recover for an alleged wrong which, if it existed at all, was a wrong to the corporation alone and not to a group of persons who had once been but no longer were among its stockholders. [15]

These examples illustrate the cavalier treatment given by the majority below to a careful evaluation of all the evidence, and the resolving of conflicting testimony, made by the trial court in a case of grave importance to petitioner, a case which involves not only substantial

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939, 946 (1941); *McIlvaine* v. *City Nat'l. Bank & Trust Co. of Chicago*, 314 Ill. App. 496, 42 N.E. 2d 93, 98 (1942).

This limitation on recovery in a stockholder derivative action has been recognized by the Tenth Circuit itself in *Arn* v. *Dunnett*, 93 F.2d 634, 636 (10th Cir. 1937), *cert. denied*, 304 U.S. 577, as well as by other Courts of Appeals. See *Green* v. *Victor Talking Machine Co.*, 24 F.2d 378 (2d Cir. 1938), *cert. denied*, 278 U.S. 602; *cf. Ramsburg* v. *American Inv. Co.*, 231 F.2d 333, 339 (7th Cir. 1956); *Peter* v. *Western Newspaper Union*, 200 F.2d 867, 873 (5th Cir. 1953).

[15] In allowing recovery to the individual respondents who admittedly were no longer stockholders (Appendix, p. 63), the majority below ignored Rule 23(b) of the Federal Rules of Civil Procedure. By its own words, this rule governing the bringing of derivative actions declares that only persons who are "shareholders" at the time a suit is brought may be plaintiffs in a derivative action on behalf of a corporation. See *H.F.G. Co.* v. *Pioneer Pub. Co.*, 162 F.2d 536 (7th Cir. 1947); *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, 175 (S.D.N.Y. 1945); *Malcolm* v. *Cities Service Co.*, 2 F.R.D. 405 (D. Del. 1942). Clearly, none of

sums of money but most importantly petitioner Black's reputation. The trial judge heard petitioner Black and clearly credited his testimony. The trial court concluded, as was its responsibility and function, that Black was telling the truth. The majority below should not be permitted to sweep aside this basic right of a defendant to give testimony and to have his credibility decided by a judge who was serving in the place of a jury of his peers. There is a compelling need for this Court to speak firmly on the confines of appellate review which have been so clearly exceeded by the court below.

CONCLUSION

This litigation discloses the mischief that can ensue from failure to adhere to jurisdictional requirements in litigation which comes into federal courts solely on the basis of diversity of citizenship. In the present posture of this case, it compellingly calls for review by this Court so that there be an authoritative determination of the basic jurisdictional rules which the lower courts must follow in diversity litigation, and particularly in the use of the device of the spurious class suit. Paramountly, the Court should resolve the conflict which arises from the failure of the court below to require that federal jurisdictional requirements be met. Moreover, this Court should speak on the refusal of the court below to honor the findings of the trial court and insure that this disregard of the proper scope of appellate review is corrected.

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the individual respondents could satisfy this requirement, for by affirming the sale of Black-Marshall stock to NCRA by petitioner. they ceased to be either legal or equitable stockholders.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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AUGUST, 1956.

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 3495

A. M. AMEN, PLAINTIFF,

v.

BLACK-MARSHALL OIL COMPANY, a Corporation, et al., DEFENDANTS.

No. 3509

A. M. AMEN, et al., PLAINTIFFS,

v.

BLACK-MARSHALL OIL COMPANY, a Corporation, et al., DEFENDANTS.

No. W-143

D. ARTHUR WALKER and FRED WINDISH, Co-Receivers of Black Marshall Oil Company, a Corporation, PLAINTIFFS,

v.

WILLIAM H. BLACK and RUTH F. BLACK, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW*

At Wichita, Kansas, on the 21st day of April, 1952, these controversies came on for hearing, the respective plaintiffs appearing by their attorneys, D. Arthur Walker,

* These findings and conclusions are as entered by the District Court, with the exception that the record references have been changed to correspond with the printed record.

W. L. Cunningham and William E. Cunningham, of Arkansas City, Kansas; Martin M. Lucente, Jack O. Brown of Chicago, Illinois; Burrell Barash of Galesburg, Illinois; Henry Gott, George B. Collins and W. R. Martin of Wichita, Kansas. The defendants appeared by their attorneys, George Siefkin, Malcolm Miller and Robert N. Partridge.

Thereupon, the cases proceeded to trial on the issues defined in the pleadings in all the actions which were consolidated for trial. After the cases were tried and upon request of counsel, time was given in which to file suggested findings of fact and briefs by all parties after a full transcript of the trial was prepared. Thereafter briefs were filed and all the cases were argued on June 19, 1953, at Wichita, and after such argument were finally submitted to the Court. The Court, being duly advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

I

No. 3495 was begun by the filing of a complaint by Mr. Amen on June 28, 1949. The original defendants named were Black-Marshall Oil Co., a corporation; National Cooperative Refinery Association, a corporation; Landowners Oil Association, a corporation; William H. Black; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund. At the plaintiff's motion the action was dismissed as to National Cooperative Refinery Association, a corporation; Leon Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund. (P. 11 and 24). Sherrard later became an intervening plaintiff. An amended complaint was filed on July 25, 1950. Intervening complaints were filed by the following plaintiffs on the dates stated: On July 25, 1950, Baldwin, Fred Brown, Ogle, William Brown, Clark, Danford, Elving, Edith Hall, Hays Hall, McBride, Nelson, E. W. Robinson, L. E. Robinson, Dr. Rogers, Runbom, Riley, Stephens, Stites and Wadleigh; on February 10, 1951, Constant, Ets Hokin, Sherrard and Stevenson, Lundblad and Jones.

The number of shares in controversy for the original and intervening plaintiffs are as follows: Amen, 100; Baldwin, 100; Fred Brown, 500; Wm. Brown, 400; Clark, 365; Constant, 1,850; Danford, 3,875; Elving, 440; Ets Hokin, 450; Edith Hall, 2,900; Hays Hall, 4,200; Jones, 500; Lundblad, 2,300; McBride, 500; Nelson, 1,000; Ogle, 325;

Riley, 1,000; Robinson, 1,000; Dr. Robinson, 3,650; Dr. Rogers, 3,550; Runbom, 500; Sherrard, 6,983; Stephens, 1,200; Stevenson, 1,250; Stites, 1,525; Wadleigh, 3,000; (Ex. V, R. 1885-1887; Ex. 97-102, R. 1559-1575).

All these shares were sold in 1944 and 1945, through Dale Ives. (R. 158-160, 162, 164, 166, 179, 180; R. 215, 217, 201-203; R. 257, 258, 259-261; R. 269-272; R. 281, 282; Ex. F, R. 1692-1696; R. 310-312; R. 328-330; R. 364; R. 395, 396; R. 422-423, 425-426; R. 449-450; R. 451-453; R. 454-456; R. 457-460; R. 476-478, 485; Ex. 81, R. 1538; Ex. G, R. 1717; R. 494-495; Ex. P, R. 1839, 987, Ex. O, R. 1839, 987, Ex. 108, R. 1576-1577; R. 508-510, 514; R. 521, 525-528; Ex. H-1 and H-2. R. 1948, 527-528; R. 536-538, 540-542; R. 546-549; R. 596, 601; R. 926-929, 931, 934-935, Ex. 346 and 347, R. 1662; R. 942-945; Ex. V, R. 1885-1887, Ex. 97-102, R. 1559-1575).

This controversy concerns whether these original and intervening plaintiffs remained the equitable owners of the shares of stock set opposite their names hereinabove or whether they were entitled to recover from the defendants any sums in addition to the funds received at the time of the sale through Ives in 1944 and 1945.

This action was tried as a result of a consolidation with No. 3509 and No. W-143 during the trial of No. W-143. (R. 894-898).

II

On June 28, 1949, Amen, Wadleigh, Danford, Dr. Robinson, Hays Hall and Riley filed action No. 3509. The original defendants named were Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; William H. Black; Ruth F. Black; William F. Black; National Cooperative Refinery Association, a corporation; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund; Cecil C. Anderson; Gladys M. Anderson; Lottie H. Anderson; Walter H. Beech; Howard S. Bryant; Fayette B. Dow; Walter G. English; Frank Fritts; Mary G. Fritts; Jas. H. Graham; Edith Hahn; Jesse S. Montgomery; Ruth Kellogg Orr; H. O. Peet & Co., a corporation; Edward Roos; Smith, et al., Trustees for Joan Birnie Hamill, Elizabeth Byron Smith, Harold Smith, Anna Byron Waud, Emily Birnie Smith.

At the plaintiff's motion the action was dismissed as to all defendants except Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; William H. Black; Ruth F. Black; William F. Black; later Berg-

lund became an intervening plaintiff. On July 25, 1950, Bowers, McBride, Nelson, Stites, Baldwin, Berglund, Dr. Rogers, Runbom, Fred Brown, William Brown, Edith Hall, Ogle, Clark, Elving, Stephens and Mr. Robinson filed intervening complaints in No. 3509 and on February 10, 1951, Constant intervened in No. 3509.

The number of shares in controversy held by the different original plaintiffs and intervening plaintiffs are as follows: Amen, 100; Baldwin, 100; Berglund, 3,483; Bowers, 250; Fred Brown, 500; Wm. Brown, 400; Clark, 365; Constant, 1,850; Danford, 3,875; Elving, 440; Edith Hall, 2,900; Hays Hall, 4,200; McBride, 500; Nelson, 1,000; Ogle, 325; Riley, 1,000; Robinson, 1,000; Dr. Robinson, 3,650; Dr. Rogers, 3,550; Runbom, 500; Stites, 1,525; Wadleigh, 3,000. (Ex. V, R. 1885-1887).

This case was in all respects similar to No. 3495 except for the difference in the original plaintiffs and the intervening plaintiffs. The cause was consolidated for trial with No. 3495 and No. W. 143 during the trial of No. W-143. (R. 894-898).

III

Co-receivers D. Arthur Walker and Fred Windish were appointed for the Black-Marshall Oil Company by the United States District Court for the Southern District of Illinois in Civil Action P-1094. J. K. Stevenson, J. R. Sherrard and Spencer I. Berglund were defendants in this action and later became intervening plaintiffs in either 3495 or 3509. (Ex. 1, R. 1510).

These co-receivers filed case No. W-143 on July 14, 1950. Subsequently the co-receivers filed an intervening petition in No. 3495 on September 25, 1950 (R. 25, 26), and in No. 3509 on November 25, 1950. Such receivers were appointed in an action brought in the Southern District of Illinois by some of the plaintiffs in No. 3495 and No. 3509. Trial was had of this cause brought by the co-receivers during which cases Nos. 3495 and 3509 were consolidated with it. (R. 894-898). At the close of all the plaintiffs' evidence, the co-receivers elected to rely on their complaint in No. W-143. (R. 952). The action of the co-receivers is to redress wrongs, allegedly committed by the defendants to the corporation, Black-Marshall Oil Company.

IV

The Petroleum Investment Company was formed in Illinois in late 1938 as a partnership association, joint ad-

venture, syndicate or group of individuals, being, in addition to Black and Ives, Berglund, Hazel Constant, Danford, Edith Hall, Hays Hall, the Lundblad sisters, Dr. Robinson, Dr. Rogers, Sherrard, Stevenson, Stites and Wadleigh. Many of these individuals signed Petroleum Investment Company agreements with Black. Most of the investors in each instance invested in the company through Dale Ives who was their leader and spokesman. The Petroleum Investment Company invested about $21,000.00 in leases and the development of leases but was not successful and by early 1939 had exhausted its funds in drilling nine dry holes in Illinois and Indiana. (Ex. 4, R. 1524; R. 1149, 1468, 1469, 1221-1227, 1207, 1234; R. 137-139, 173, 145, Ex. 3, R. 1524; R. 189, 192, 207-209; R. 250-251, 235, 236, 240, 242; Ex. 13, R. 1533; R. 299-303, Ex. F, R. 1676, 1678, 1684; Ex. 28, R. 1535; R. 323-327, 335; Exs. 29 through 53, R. 1535; R. 1535; R. 1234, 1235, 1239, 1240; R. 352, 353, 355; R. 415, 416; R. 465, 469, 481, 482, 472; Ex. 80, R. 1537; R. 488, 489; R. 587, 588; R. 921, 922; R. 936, 937; R. 368-370, 616, 617, 621, 628, 770; Ex. 29 through 53, R. 1535).

V

In the early spring of 1939, Black left Illinois to meet Marshall in Tulsa, Oklahoma. Black acquired at least $10,000.00 from the sale of his interest in leases in White County, Illinois, which transaction and which leases had no connection whatever to the work of the Petroleum Investment Company, the Black Oil Company or the Black-Marshall Oil Company. (R. 1150, 1151, 1155, 1230-1232, 1234, 1242-1246, 1357, 1358, 1470-1475, 1046, 1060-1061; Ex. U-3, R. 2300). After an automobile accident in which Black received injuries which necessitated his hospitalization, he met Marshall in Tulsa and formed a partnership with Marshall for the acquisition and development of leases in Kansas. (R. 1480; Ex. Y-3, R. 2312; R. 1110, 1152, 1161). In June or July, the partnership, consisting of Black and Marshall, acquired the Esfeld lease as a farmout from Sohio Oil Company and made a deal with Bennett, Bronson & Murmos to drill a well on the Esfeld lease which well came in as a producer in July of 1939 and was equipped by the partnership. Thereafter and prior to the incorporation of Black-Marshall, the partnership acquired four other leases in Kansas, the Weber, the Dolechek, the Hoffman and the Krier. (R. 1152-1154, 1254, 1258, 1477, 1478). Beginning in late August or the early fall of 1939, Black received funds from

Ives and others of the Petroleum Investment group to assist the partnership in acquiring and equipping leases and as of December 7, 1939, had received $17,650 from such group and had spent on the Kansas leases $28,415. (R. 1152, 1153, 1236, 1242, 1246, 1248; Ex. 10, R. 1532, 228). Subsequently and before incorporation, both Black and the Illinois investors put more money into the venture. (Ex. B-2, R. 2269; Ex. C-2, R. 2270; Ex. E-2, R. 2272; Ex. V-3, R. 2305; Ex. W-3, R. 2308; R. 1259, 1260, 1490-1493).

VI

(A) The Black-Marshall Oil Company was incorporated on January 3, 1940, with an authorized capital of 20,000 shares of six per cent cumulative preferred stock at a par value of $10.00 and 200,000 shares of no par value common stock; a total of 9,055 shares of preferred stock and 122,500 shares of common stock were issued in exchange for the five Kansas leases, the Dolechek, Esfeld, Hoffman, Krier and Weber, and the corporation assumed an indebtedness of $8,827.93 against such leases. The common stock was issued on the basis of $1.00 per share. (R. 1157, 1158, 1259-1261; Ex. I, R. 1720; Ex. R, R. 1845; Ex. Y through Ex. E-1, R. 1917 to 1926). The Petroleum Investment Company investors were issued stock on the basis of one share of common for each $2.00 invested, including all money invested in the dry holes in Illinois, and one share of preferred to each $4.00 invested. (R. 173, 174, 149; R. 193, 206-208; R. 250, 251, 241, 242; R. 306; Ex. F, R. 1681, 1684; R. 327, 335; R. 354-356; R. 417, 430; R. 471, 481, 482; R. 490, 499; R. 588, 589; R. 640, 769, 770). Ives allocated the original issue of stock to each of the investors in the Petroleum Investment Company. (R. 1201, 1202; 1049; 1078, 1079; Ex. X, R. 1915). There was also authorized the issuance of 2,000 shares of preferred and 20,000 shares of common to be exchanged for 33,856.8 shares of the capital stock of the Landowners Oil Association. (Ex. I, R. 1721; Ex. R, R. 1845; Ex. Y through Ex. E-1, R. 1917-1926). Black became chairman of the board of directors and president of the corporation at its inception and continued in such offices throughout the existence of the corporation. (R. 1299; Ex. I, R. 1718). Ives became a director and secretary-treasurer of the corporation and continued in such offices throughout the existence of the corporation. (R. 372; Ex. I, R. 1718). Berglund was elected a director in 1941 and served until he moved

to Florida in September, 1944. (R. 471, 473; Ex. I, R. 1767; 1786, 1789, 1791, 1795, 1798). Dr. Robinson was elected a director at the 1941 stockholders meeting but was called to the service and never served as a director for any real period of time. (R. 245; Ex. I, R. 1767; 1786). Sherrard was elected a director at the 1941 stockholders meeting held in January in Aledo and served and remained as a director until September, 1945. (R. 419-420, 430-444; Ex. I, R. 1767; 1786, 1789, 1791, 1795, 1798). Stevenson was elected a director at the inception of Black-Marshall but only came to Kansas once but was re-elected a director through 1944. (R. 930, 932; R. 711-715; Ex. I, R. 1721; 1767, 1786, 1789, 1791, 1795, 1798). Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually, and were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original five Kansas leases. (R. 1192, 1479, 1480, 1287, 1281, 1292; 1044-1046; 1061-1063; Ex. S, R. 1859, 1869, 1872; Ex. R, R. 1845; Ex. 97, R. 1558; Ex. 98, R. 1561).

(B) After incorporation and throughout the history of the corporation to September, 1945, Black received many requests, demands and incessant overtures for dividends, loans, money for stock from the Aledo group of stockholders. (R. 1170, 1173, 1294, 1310, 1318-1320, 1323, 1325, 1330; R. 1109, 1110; Ex. P-1, R. 2079; Ex. Q-1, R. 2080; Ex. G-2, R. 2273; Ex. K-2, R. 2275; Ex. N-2, R. 2277; Ex. H-2, R. 2273; Ex. O-2, R. 2278; Ex. P-2, R. 2279-2281; Ex. Q-2, R. 2281; Ex. R-2, R. 2282; Ex. T-2, R. 2283; Ex. U-2, R. 2284; Ex. X-2, R. 2284; Ex. S-2, R-2282; Ex. C-3, R. 2288; Ex. 121, R. 1590, 760; Ex. 122, R. 1590; Ex. 123, R. 1591, 761, 762; Ex. F-3, R. 2290; Ex. G-3, R. 2290; Ex. 27, R. 1534, 297; Ex. 86, R. 1539).

VII

In the spring or early summer of 1944, many attempts were made to sell the stock in Black-Marshall Oil Company or the assets of Black-Marshall Oil Company to realize $10.00 a share to each stockholder. The NCRA was among the prospective purchasers but the contemplated sale to the NCRA fell through in May of 1944, and no sale could be made of Black-Marshall stock or assets to realize $10.00 a share for each stockholder. (R. 1170-1172, 1330; R. 919, 920; Ex. 344, R. 1659; Ex. 345, R. 1660; Ex. 122, R. 1590). During 1944 Dale Ives made misrepresentations to many Aledo stockholders:

In the summer of 1944, Ives told Berglund that the producing properties of Black-Marshall had been sold and that Berglund should turn in half his shares; that there would be an assessment of so much a share in case of starting up later on. (R. 476-477).

In the summer of 1944, Ives told Fred Brown that Black had made a deal with the Kansas City Coop. and that it would be necessary for the stockholders to turn in half their shares to show the purchasers that they were behind Mr. Black in the deal and that the Landowners and undeveloped leases would not be sold (R. 536, 537).

Ives told William Brown in 1944, that Black had completed a deal to sell the producing wells of Black-Marshall and that the stockholders should turn in half their stock to sh w good faith in the deal; that the Landowners and undeveloped leases were being retained. (R. 546-547).

In the summer of 1944, Ives told Clark that he would like for him to surrender half his Black-Marshall shares since the producing properties had been sold and half the stock was needed to show good faith and bind the sale but that the undeveloped properties would be retained and after two years each of the stockholders would receive his proportionate interest in such undeveloped properties. (R. 281, 282).

In June of 1944, Ives told Mrs. Constant that she should bring in half the shares she and her husband held since the producing properties were being sold and the Landowners and undeveloped properties retained; that Black needed half the shares in order to show good faith and that 51% of the shares were behind the deal. (R. 494-495).

Ives told Danford in June of 1944, that a deal had been made where the stockholders would receive $10.00 a share for the first half of their stock and more for the second half of their stock; that the undeveloped properties and Landowners would be retained but that Black had to have 51% of the shares to bind the sale. (R. 158-160, 162, 164, 179).

In the summer of 1944, Ives told Hays Hall that Black had made a deal with the Coop. and sold the producing properties of Black-Marshall and had retained the undeveloped properties and Landowners which after two years would form the nucleus of a new corporation and each stockholder would get the same proportionate shares as they held in Black-Marshall; that at least half the stock

was needed to show good faith. (R. 310, 311; Ex. F, R. 1692-1694).

In July or August of 1944, Ives told his secretary, Myrtle Lundblad, that Black had made a deal and was selling the producing wells of Black-Marshall and retaining the undeveloped properties and Landowners; that the stockholders should send in half their stock so that Black could make the deal. (R. 942, 944).

In June of 1944, Ives told Riley that Black had made a sale of the producing properties and had to have possession of at least 51% of the stock in order to show good faith; that the undeveloped leases and Landowners were being retained; that the first half would be at $10.00 and the second half would be called for later and would bring more money. (R. 394, 396).

In the summer of 1944, Ives told Mr. Robinson that there were prospects of a sale of the Black-Marshall Company or its shares; that half the shares had to be put up to show good faith; that the purchaser had an option on buying the company or the producing wells and that the entire stock would eventually be sold. (R. 269, 272).

Ives told Dr. Robinson about Easter time in 1944, that Black-Marshall was going to be sold and that Dr. Robinson should leave his shares with Ives. (R. 257, 258).

In the summer of 1944, Ives wrote Dr. Rogers that Black was on a deal to sell Black-Marshall and that he needed her shares in order to show good faith in the deal; and told her that the shares would become worthless if she did not turn them in since the sale was going through. (R. 328, 329).

In May of 1944, Ives told Runbom to bring in his stock and Runbom did and asked that when it was reissued it be issued jointly in both his and his wife's names. (R. 521, 525, 526; Ex. H-1, H-2, R. 1948, 527, 528).

In the summer of 1944, Ives told Sherrard that a deal had been made whereby the stockholders would receive $10.00 a share for the first half of their stock and probably more for the remaining half; that the sale was of the producing properties; that the undeveloped leases and Landowners were being retained. (R. 422, 423).

In June of 1944, Ives told Stephens that the producing properties of Black-Marshall had been sold and that Ives was collecting half the stock in order to bind the deal but that the Landowners and non-producing properties were being held. (R. 508, 514).

Ives told Stevenson in 1944, that a sale had been made of Black-Marshall and in order to complete the sale the stockholders had to turn in half their stock at $10.00 a share. (R. 926, 927, 931, 934; Ex. 347, R. 1662).

In June of 1944, Ives told Dr. Wadleigh that a deal was being made to sell Black-Marshall; that Wadleigh should turn in half his stock since 51% of the stock was needed to show a bona fide deal. (R. 215, 201, 202).

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. (R. 1171, 1173, 1480 1481, 1209, 1318-1319, 1323, 1331, Ex. 121, R. 1590, 760; Ex. 122, R. 1590; Ex. 123, R. 1591, 761, 762; Ex. 124, R. 1591, 763-765; Ex. E, R. 1674; Ex. F-3, R. 2290; Ex. G-3, R. 2290).

Ives obtained approximately half the shares held by all the plaintiffs in actions Nos. 3495 and 3509 which he sent in to the Black-Marshall Company or to Bill Black, and distributed to the same stockholders $10.00 a share for their stock so turned in. Of the shares so turned in; 25,000 were sold to Roos, Gill and Kincade. (R. 1310, 1320-1322, 1328; Ex. V, R. 1885; Ex. 100, R. 1565; 11,714 were sold to Black and the remainder were paid for by Black-Marshall itself, retained by Black-Marshall and subsequently retired. (R. 1193, 1194, 1172, 1333-1334, 1375-1381; Ex. V, R. 1885; Ex. 266, R. 1605, 1376).

VIII

In 1954, further attempts were made to sell the Black-Marshall Oil Company or its stock to various purchasers for an amount to net each shareholder $12.00 a share. No purchaser was found who would pay an amount to net each shareholder $12.00 a share for the stock outstanding in Black-Marshall and a contemplated sale to the NCRA fell through in September 1945. (R. 1173-1175, 1361, 1125, 1126). In 1945 Ives made certain misrepresentations to various stockholders:

He sent a wire to Berglund in Florida on August 29, 1945, advising that the producing properties of Black-Marshall were sold for $12.00 a share and the Landowners Oil Company retained; that Berglund should send his stock in blank to the Fourth National Bank in Wichita and close the deal by September 1. (R. 478, 485; Ex. 81, R. 1538; Ex. G, R. 1717).

In July or August of 1945 Ives told Fred Brown that the deal with the Kansas City Coop. had gone through and

it was necessary to turn in the remaining half of the stock and that after two years the stockholders would develop the undeveloped properties and Landowners which were retained and that the Black-Marshall stock would bring $12.00 a share. (R. 538, 540-542).

In the summer of 1945, Ives told William Brown that the deal was completed and that he should turn in the remainder of his stock; that the producing wells of Black-Marshall were being sold and the undeveloped leases and Landowners retained. (R. 548, 549).

In the latter part of August, 1945, Ives told Clark to bring in his remaining shares; that the undeveloped properties were being retained; that the producing properties were sold and that after two years such undeveloped properties would be returned to the stockholders and each would receive the same proportionate amount as held in Black-Marshall. (R. 282).

Ives wrote Black-Marshall relative to the sale of the Constant stock on September 17 and on September 20, 1945. (Ex. P, R. 1839, 987; Ex. O, R. 1839, 987; Ex. 108, R. 1576, 1577).

About August of 1945, Ives told Danford that the sale of Black-Marshall was completed and that the rest of the stock should be turned in for $12.00 a share and that the Landowners and undeveloped acreage would be retained and held for two years because of tax matters or for legal reasons and would form the nucleus of a new corporation but that for two years the personnel of Black-Marshall had to work with the purchaser, the Kansas City Coop. (R. 164-166, 179, 180).

Late in the summer of 1945, Ives told Hays Hall that the deal mentioned in 1944, was completed; that the stock should be turned in and he would receive $12.00 a share. (R. 311, 312, Ex. F, R. 1695, 1696).

In October of 1945, Ives told his secretary, Miss Lundblad, she should turn in the second half of her stock and would receive $12.00 a share but that the stockholders would have more money coming since the Landowners and undeveloped properties would be divided among them, but not for two years, because of taxes. (R. 943-945).

In August of 1945, Ives told Riley that the Black-Marshall sale was complete and the stockholders would receive $12.00 a share; that the undeveloped leases and Landowners were retained and would be returned as the nucleus for a new company in which the stockholders would re-

ceive the same proportionate ownership as they had held in Black-Marshall but that for two years the personnel of Black-Marshall would work for the purchaser, the Kansas City Coop. (R. 395, 396).

In the late summer or early fall of 1945 Ives told Mr. Robinson that the Black-Marshall deal had gone through, that there was a buyer who was going to take up the option on all the developed properties and close the deal for the sale of the stock which should be sent in; that a new company would get started after two years to operate the Landowners, that the purchaser would not permit the operation of the Landowners or other leases for two years. (R. 270, 271).

Ives told Dr. Robinson in September of 1945 that Black-Marshall had been sold but that the stockholders would be in the oil business again in a new company on the same pro rata basis as held in Black-Marshall, soon. (R. 259-261, 248).

In the summer of 1945 Ives wrote Dr. Rogers to send in her remaining shares of Black-Marshall stock. (R. 329, 330).

In 1945 Ives told Sherrard that the balance of the stock should be turned in and would bring $12.00 a share but that the Black-Marshall sale did not include all the assets of Black-Marshall since the undeveloped properties and Landowners were being retained but would not come back to the stockholders for two years and that after such period they could make plans for development of such properties. (R. 425, 426).

In the summer or early fall of 1945 Ives told Stephens that Black was making a final deal on selling the producing properties of Black-Marshall but was retaining Landowners and the undeveloped properties for two years; that a side deal was being made whereby the Landowners and undeveloped properties would come back after two years but were held up for such period for tax purposes. (R. 509, 510).

In August of 1945 Ives told Stevenson that his remaining shares in Black-Marshall should be surrendered and that he and the other stockholders would be reissued the same amount of stock in the Landowners Company as they had held in Black-Marshall but not until after legal technicalities were ironed out would the reorganization take place. (R. 927-929, 931, 934, 935, Ex. 346, R. 1662).

In the summer of 1945 Ives told Mrs. Stites that Black

needed the rest of the stock to complete the sale of Black-Marshall and that a new company would be formed and the stockholders would have two shares for one on the shares held in Black-Marshall but not until after two years. (R. 364).

In 1945 Ives told Wadleigh that Black-Marshall was sold and that Ives had to have the rest of his shares. (R. 217; 202, 203).

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. (R. 1189-1191, 1203, 1209, 1348-1349, 1361-1362, 1368-1369, 1392-1393, 1480-1481; Ex. 27, R. 1534, 297; Ex. P, R. 1839; Ex. 108, R. 1576; Ex. O, R. 1839, 987; Ex. 86, R. 1539; Ex. 12, R. 1532).

Ives obtained the balance of the stock held by the plaintiffs in Nos. 3495 and 3509 and delivered such stock to the Black-Marshall Oil Company or Black. The Black-Marshall Oil Company paid each one of the plaintiffs for such shares at the rate of $12.00 a share. (R. 1201; Ex. V, R. 1885).

In September of 1945 a loan agreement was negotiated between Black-Marshall and the NCRA which was reduced to writing on October 1, 1945, whereby the NCRA loaned $3,200,000 to Black-Marshall and Black-Marshall obligated itself to drill 12 producing wells each year for which the NCRA would loan an additional $22,000 for each producing well so drilled. (R. 1175-1177, 1364, 1365; Ex. 95, R. 1551, 558; Ex. 359, R. 1665; Ex. 360, R. 1665).

The NCRA was conversant with the purchase by Black-Marshall of the stock owned by the plaintiffs in Nos. 3495 and 3509 at the time of the loan. The NCRA appraised the value of the Black-Marshall properties at the time of the loan as being very little, if any, in excess of the amount of the loan. (R. 1190-1192, 1126, 1130-1131, 1367).

IX

There is no evidence that the following plaintiffs in Nos. 3495 and 3509 relinquished or sold their stock in the Black-Marshall Oil Company as a result of any misrepresentation by anyone: Bowers, 250 shares; Ets Hokin, 450 shares; Jones, 500 shares; McBride, 500 shares; Nelson, 1,000 shares; Amen, 100 shares; Baldwin, 100 shares; Elving, 440 shares; Edith Hall, 2,900 shares; Ogle, 325 shares.

(R. 479, 1717, 485, 486, 449, 450, 161, 162, 451-453, 162, 457-460, 454-456, 596, 601).

X

Black received a letter from Ives dated November 10, 1945, stating that Ives had told the Aledo stockholders that Black-Marshall was sold and the Landowners and undeveloped properties retained which would be the basis of a new company after two years and that Black should so inform Wadleigh. This was the first notice to Black of Ives' misrepresentations. Black took no action as a result of or after receiving this letter. (R. 1532, 1352-1356; Ex. 84, R. 1538; 1387-1391; 1503, 1504; Ex. 375, R. 1666; 1499-1500; 945-946, Ex. 12, R. 1532).

XI

At the time of the incorporation of Black-Marshall Oil Company, the corporation was without funds with which to develop its oil properties. Funds were obtained to develop such properties by Black's obtaining loans from various lending agencies which he personally guaranteed up to $1,000,000 at the First National Bank & Trust Co., of Oklahoma City, alone, throughout the existence of the corporation. (R. 1161-1163; Ex. R-3, R. 2298-2300; R. 1845, 1847; R. 1917, Ex. Y, R. 1917). During the corporate ex- carried an account with the corporation and took advances istence Black carried an account with the corporation and took advances from and made advances to the Black-Marshall Oil Company. (R. 1163, 1207; 1436-1458; Ex. K, R. 1813; 1814; 1816; 1819; 1820; 1822; 1823). All such transactions were regularly kept and recorded on the books and records of the corporation and an audit was made, begining on July 31, 1940, at the end of each fiscal year which disclosed the balance in all accounts, including Black's account. R. 1935; 1939; Ex. E-1, R. 1926-1941; Ex. R, R. 1845; Ex. Y, R. 1917; Ex. Z, R. 1917; Ex. A-1, R. 1917; Ex. B-1, R. 1918; Ex. C-1, R. 1918; Ex. D-1, R. 1922; R. 1049, 1080-1084; 1169; 946. At the end of the fiscal year July 31, 1940, Black-Marshall owed Black $15,993.25; on July 31, 1941, $5,416.70; on July 31, 1942, $2,305.62; at the end of the fiscal year July 31, 1943, Black owed the corporation $3,343.96; on July 31, 1944, $23,907.85; and on July 31, 1945, $3,092.51.

Thereafter Black obtained substantial funds for his own private purposes from Black-Marshall, including $250,000 for a tuna boat, all of which items were regularly charged to Black's account on the books of the corporation and the account closed out by Black's check dated June 30, 1947, in the amount of $591,064.07. (R. 1196-1197, 1426, 1437, 1485; Ex. S-3, R. 2300; Ex. 290, R. 1617, 1629).

The stock purchased from the plaintiffs and others was charged first to the Dale Ives stock account and later to the W. H. Black stock account and the suspense stock account, which accounts were finally balanced and closed out in June, 1947. (R. 1047, 1048; 1094-1096; 1193, 1194; Ex. 288, R. 1613; Ex. 289, R. 1615; Ex. 88, R. 1541; Ex. 89, R. 1541; Ex. 108, R. 1576; Ex. 109, R. 1578; Ex. 110, R. 1579; Ex. I, R. 1799; Ex. I, R. 1740).

XII

In June of 1947 Black sold his stock in Black-Marshall to the NCRA for $51.06 a share. (R. 1485, 1185-1186, 1196, 1140, 1142-1147, 958, 961, 963, 979). The NCRA also purchased stock held by Dale Ives as executor of the Boyd estate (Ex. 0-3, R. 2296). Dale Ives was employed by NCRA to send out notices for a meeting of the stockholders to consider dissolution and to dissolve the Black-Marshall Oil Company. (Ex. N-1, R. 2073; Ex. 0-1, R. 2074). The Black-Marshall Oil Company was dissolved and a statement of intent to dissolve by voluntary action of the corporation was filed of record in Mercer County, Illinois, on June 30, 1947, recorded in Book 185 on pages 451 and 452, and the articles of dissolution of Black-Marshall were filed in Mercer County, Illinois, on July 1, 1947, recorded in Book 185, pages 453 to 456, inclusive. (Exs. 279 and 280, R. 1607, 1610, 841; R. 1140; 1128-1130, 1134-1135; Ex. A-4, R. 2313; Ex. P-3, R. 2296).

After dissolution, all the assets of the Black-Marshall Oil Company were distributed in kind pro rata to its stockholders of record, including the NCRA. (R. 961, 963-966, 976-978; Ex. 292, R. 1649; 1128, 1129, 1137; 1140; Exs. 279, 280, R. 1607, 1610, 841, 846; Ex. E-4, R. 2314; Ex. F-4, R. 2316). Such dissolution and distribution of assets was made after Black's repayments to the corpo-

ration and the closing out of all Black's accounts with the corporation and after the stockholders of Black-Marshall, including the NCRA with 65,126 shares and Victor Roos with 10,000 shares, had full knowledge of Black's accounts and the method of balancing such accounts. R. 1185-1187; 1128, 1129, 1131, 1132, 1134; 1140; Ex. E-1, R. 1926, 833; Ex. I, R. 1783, 1785; 1804-1807; Ex. 279, 280, R. 1607, 1610).

XIII

The evidence discloses no purchaser could be obtained who would pay enough to net each stockholder in Black-Marshall $10.00 a share in 1944 and the value of Black-Marshall stock in 1944 did not exceed $10.00 a share. (R. 1170, 1172, 1208, 1325-1326, 1330-1331, 1339; 164; 311; Ex. A-2, R. 2267; Ex. Y-2, R. 2285; Ex. Z-2, R. 2286; Exs. A-3 and B-3, R. 2287; Ex. I, R. 1768-1771; Ex. I, R. 1796-1799; Ex. X-2, R. 2284).

Prior to the NCRA loan to Black-Marshall on October 1, 1945, no purchaser could be found who would pay enough for Black-Marshall to net the stockholders $12.00 a share and the stock of Black-Marshall did not exceed in value $12.00 a share. (R. 1173-1176, 1190-1191; 1126, 1129-1131; Ex. K-3, R. 2293; Ex. 25, R. 1534, 295; Ex. 26, R. 1534, 296; Ex. 27, R. 1534, 297; 1551, 558-566; 1364, 1365). After the loan to Black-Marshall on October 1, 1945, some stock was purchased by Black-Marshall at $17.50 a share. (R. 1367, 1383-1385; 1580, 603-604; Ex. 115, R. 1581; Ex. 116, R. 1583; Ex. 117, R. 1585; Ex. 118, R. 1587; Ex. I, R. 1775). There is no other evidence of the value of Black-Marshall stock at this time.

The increase in value of Black-Marshall stock after September 30, 1945, came as a result of the drilling program of Black-Marshall and the obtaining of 146 producing wells, thus increasing the production of the Black-Marshall Oil Company during the period when the price of oil rose from $1.25 per barrel to $1.85 per barrel. (R. 1182, 1191-1192; Ex. G-1, R. 1947; Ex. I-1, R. 1949 et seq.; Ex. 94, R. 1545 et seq.).

XIV

The Court hereby resolves all controversial issues of fact and law not specifically covered herein in favor of the defendants and against the plaintiffs. (R. 130).

Conclusions of Law

I

The exhibits offered in evidence by either party on which the Court reserved its ruling for later determination are all admitted in evidence.

II

Exhibits K-1 and L-1 offered in evidence by the defendants for impeachment purposes relative to the testimony of Dale G. Ives and on which the Court reserved its ruling are admitted in evidence for the purpose offered. *Insul-Wool Insulation Co.* v. *Home Insulation, Inc.*, 176 F. 2d 502.

III

The Black-Marshall Oil Company was incorporated and dissolved in the state of Illinois and the relationship of the parties is governed by the Illinois law.

131 F. 2d 400, *Maxwell* v. *Enterprise Wall Paper Mfg. Co.*; 193 F. 2d 666, *Mayflower Hotel Stockholders Protection Committee* v. *Mayflower Hotel Corp.*; 196 F. 2d 40, *Air Traffic & Serv. Corp.* v. *Fay*; 163 F. 2d 804, *Langfelder* v. *Universal Lab.*; 143 F. 2d 752, *RFC* v. *Goldberg*; 179 F. 2d 760, *Kroese* v. *Gen. Steel Castings Corp.*; 162 F. 2d 36, *Zahn* v. *Transamerica Corp.*

IV

The sale to the NCRA in June of 1947 was of stock and not assets and the NCRA received its proportionate part of the assets of Black-Marshall on distribution after dissolution and thereafter purchased the remaining assets which had belonged to Black-Marshall from the other stockholders who received their proportionate part of the Black-Marshall assets on distribution after dissolution.

V

The evidence does not establish that there was any conspiracy between Mr. Black or any of the defendants with Mr. Ives or anyone.

VI

The evidence does not establish that Mr. Ives was the agent of Mr. Black.

VII

The evidence does not establish that Mr. Black or any of the defendants was guilty of any fraud, did not practice any fraud on any of the plaintiffs, and made no fraudulent misrepresentations to any one of the plaintiffs.

VIII

The individual plaintiffs have proved no injury to themselves resulting from the sale of their stock in Black-Marshall in 1944 and 1945.

IX

The Black-Marshall corporation and all the stockholders of Black-Marshall in June of 1947 approved and ratified Mr. Black's payments and the balancing of Mr. Black's accounts with the Black-Marshall Corporation.

X

The actions of the individual plaintiffs should be dismissed and judgment entered for the defendants for the defendants' costs.

XI

The action of the co-receivers should be dismissed and judgment entered for the defendants for the defendants' costs.

Dated this 31st day of March, 1954.

DELMAS C. HILL.

Filed April 1, 1954.

ORDER CORRECTING CLERICAL ERRORS (ALL CASES).

It appearing to the Court that there is a clerical error in Conclusion of Law VII, a part of the Findings of Fact and Conclusions of Law in the above entitled case dated March 31, 1954, and entered April 1, 1954, and that such Conclusion of Law VII should read:

> The evidence does not establish that Mr. Black or any of the defendants was guilty of any fraud, prac-

ticed any fraud on the plaintiffs, or made any fraudulent misrepresentations to any one of the plaintiffs.

It is Ordered that these changes in Conclusion of Law VII be made by interlineation in the original instrument on file. Dated this 2d day of April, 1954.

DELMAS C. HILL.

Filed April 2, 1954.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1955

Number 4962

A. M. AMEN, et al., APPELLANTS

vs.

WILLIAM H. BLACK, APPELLEE.

Number 4963

A. M. AMEN, et al., APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

Number 4964

D. ARTHUR WALKER and FRED D. WINDISH, Co-Receivers of Black-Marshall Oil Company, APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

(November 25, 1955)

Appeal from the United States District Court for the District of Kansas

D. Arthur Walker and Martin M. Lucente (Jack O. Brown, Burrel Barash, Robert Martin, Edward G. Knowles, W. F. Lilleston, Douglas F. Smith and Henry V. Gott were with them on the brief) for Appellants.

Malcolm Miller (George B. Powers, Carl T. Smith, John F. Eberhardt, Stuart R. Carter, Robert C. Coulston, Robert N. Partridge and Robert M. Siefkin were with him on the brief) for Appellees.

Before PHILLIPS, *Chief Judge*, and MURRAH, *Circuit Judge*, and WALLACE, *District Judge*.

MURRAH, *Circuit Judge*.

Stripped of their duplicity and redundancy, the pleadings in these consolidated cases state four separate contested claims with a common factual background.

The first is a spurious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the Company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the Company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it, he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

The second stated claim is in the nature of a derivative action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the Company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders.

The third claim asserted by the corporate receivers is for a recovery of the profits allegedly realized by Black and his wife from the use of Company funds in personal business ventures. The fourth claim is also for proceeds realized by Black in transactions in which Company funds were used for personal profit. This appeal is from a judgment of the trial court in favor of the defendants on all tendered issues.

The Spurious Action of the Individual Stockholders

A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23(a)(3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The appellees challenge the propriety of the suit as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.

The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. Shipley v. Pittsburgh & Lake Erie Ry Co., 40 F. Supp. 870; Dickinson v. Burnham, 2 Cir., 197 F. 2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448.

In a similar action by one of the Aledo Group of investors, we sustained the maintainability of the suit and thought that the plaintiff's proof standing alone showed that "Black did devise a scheme to defraud the stockholders of Black-Marshall . . . and that Ives was Black's agent in the perpetration of that scheme." Blazer v. Black, 10 Cir., 196 F. 2d 139. Based upon substantially the same pattern of proof, the trial court in this case made separate findings of fact with respect to the claims of specifically named appellants in which it found that in the summer of 1944 Ives falsely represented to these named appellants that the producing properties of Black-Marshall were being sold for an amount sufficient to yield the stockholders $10.00 per share; that the undeveloped properties of the Company were being retained for development at a later propitious time; and that the stockholders should sur-

render fifty percent of their stock in order to bind the transaction. The court further found that in 1945 Ives falsely represented to the same appellants that the producing properties of Black-Marshall had been sold for which they should surrender the remainder of their stock for $12.00 per share. These representations were concededly false and undoubtedly induced the stockholders to part with their stock. The trial court further found, however, that Black did not solicit Ives to make such false representations and had no knowledge that they were being made as an inducement for the surrender of their stock. It was upon this basic finding that the trial court concluded that Ives was not Black's agent in the procurement of the stock; that Black was not therefore legally responsible for the false representations; and that he made no fraudulent representations to any of the plaintiffs and did not practice any fraud on any of them.

With respect to certain other specifically named appellants, hereafter noted and treated, the trial court found that no representations of any kind were made by anyone to induce them to part with their stock.

We first consider whether Ives' false represenations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. United States v. United States Gypsum, 333 U.S. 364; United States v. Waymire, 10 Cir., 202 F. 2d 550; McAllister v. United States, 348 U.S. 19; United States v. Oregon Medical Society, 343 U.S. 326.

The pertinent facts are that in 1938, Black, an oil promoter, went to Aledo, Illinois where he met a well-respected lawyer named Ives. Through Ives he met some of the appellants, business and professional men and women living in and around Aledo. As a result of these contacts, Black, with Ives as his lawyer, formed the Petroleum Investment Company, a voluntary association through which Black entered into separate contracts with the investors providing in substance that Black would use the funds entrusted to him by the respective investors in exploration for oil. The contracts in identical terms provided that Black would receive one-fourth of the profits from

the ventures and that he would have unlimited powers of management of the affairs of the respective ventures.

Acting through Ives as his attorney and agent, Black received approximately $28,000.00, most of which came from the appellants herein. These funds were unsuccessfully invested in several oil ventures in Southern Illinois. In the early part of 1939, Black left Aledo apparently for California. While enroute, he was involved in an automobile accident and awoke in a Tulsa, Oklahoma hospital to find Deering J. Marshall at his bedside. He had had previous dealings with Marshall, and while convalescing in Tulsa, he and Marshall made arrangements to acquire some oil leases in Barton County, Kansas. The first lease, known as the Esfeld, was acquired by Marshall as a farmout from the Sohio Oil Company with funds furnished by Black. A producing well was completed on the lease in the early part of July. Thereafter Black and Marshall working together acquired four other leases in Barton County, Kansas, known as the Weber, Dolechek, Hoffman and Krier. These leases were partially developed as producing properties during the latter part of 1939.

While the leases were being acquired and developed, Black commenced negotiations with the Landowners Oil Association, composed of a group of Chicago investors, looking toward the pooling of the resources of the two companies into a corporation, the stock of which would be divided between the investors in the two groups based upon the value of their respective assets. During all of these negotiations Black kept Ives advised of all developments, including the five oil and gas leases in Kansas, and on December 7, 1939 rendered a financial statement to Ives setting out the receipt of the money from the Aledo Group, its investment and results.

Pursuant to plan, the Black-Marshall Oil Company was incorporated by Ives on January 3, 1940 as an Illinois corporation with an authorized capital of 20,000 shares of cumulative preferred stock with a par value of $10.00, and 200,000 shares of no par common. Stock was issued to the Aledo investors on a basis of one share of common for every $2.00 invested and one share of preferred for every $4.00 invested, including the amounts invested in the unsuccessful Petroleum Investment Company ventures in Southern Illinois. The five producing leases in Barton County, Kansas, together with other unproductive holdings were transferred to the corporation by Black

and his associates, and the assets of the Landowners Association were also transferred to the corporation in consideration of 2,000 shares of preferred and 20,000 shares of common stock of the newly formed corporation. Black, Marshall and Ives were each issued 10,000 shares of common and 1,000 shares of preferred. At the first stockholders meeting in Aledo, Black was elected president, chairman of the board and chairman of the executive committee, and Ives was elected secretary and treasurer. Both acted in these capacities from the organization of the corporation to its dissolution upon the sale of its outstanding stock in 1947 to the National Cooperative Refinery Association. Some of the appellants here became directors of the corporation and remained such throughout the life of the corporation. The company first maintained offices in Wichita, and later in Great Bend, Kansas, near the location of the producing properties. The minute books of the corporation were kept by Ives in Aledo where the first meetings were held, but were later moved to Great Bend, Kansas where the company offices were maintained.

The productive leases in Kansas were developed in 1940 to 1944 primarily with bank loans negotiated by Black with company credit and security. The leases were prolific and at the January, 1944 board meeting in Aledo, there was considerable agitation for a dividend or at least a partial return of investment in some form. Black explained that no dividends could be paid while the drilling program was under way, and that in any event it would not be advisable taxwise because the drilling operations were being carried on largely with tax money. Several resolutions and substitute resolutions were offered looking toward a partial realization upon the investment. Finally a resolution was adopted authorizing Black to negotiate a sale of the producing properties for an amount to yield the stockholders at least $8.00 per share and providing that the nonproducing properties would be retained for future development. Thereafter, and in the Spring of 1944, Black attempted to sell the producing properties of the company and entered into a tentative arrangement with N.C.R.A. for a loan secured by fifty-one percent of the stock of the company. When these negotiations failed, Ives wrote Black on May 14, 1944 expressing his regrets and also expressing the hope that they could make "some kind of a deal so that we can pay them [the stockholders] some money by the first of June, as they are expecting

something at that time." He went on to say, "I am going to send you 440 shares of common stock which I purchased for you at $10.00 per share, but the owner must have his money by the 30th day of May", and that "I may be able to buy more of the stock at that price if you want it." A few days later, Black wrote Ives outlining his negotiations with N.C.R.A. expressing the view that he would eventually be able to make some kind of satisfactory arrangements with the co-op and asking Ives to prepare a directors' authorization "to consummate a deal with the co-op." Referring to the purchase of the stock of the Aledo Group, Black told Ives that it would not be possible to do anything by June 1, but that if they would sign a sales agreement giving him sixty days, he felt sure he could get the stockholders $10.00 a share. He was confident that he could secure a market for the stock provided there would be enough shares to "interest a purchaser who would be willing to make an investment substantial enough to warrant his taking some active part in the company." He referred to the arrival "next week" of some friends of Arthur Kincade from New York who were interested in such an investment. Ives was asked to write or wire the number of shares he thought could be acquired in Illinois so that Black would have some idea of what he would be able to offer the prospective purchasers.

Thereafter, and beginning in June of 1944, Ives contacted all of the Aledo Group, appellants here (except those hereafter noted) advising them that the producing properties of the company had been sold for an amount sufficient to return $10.00 per share, and that a deposit of fifty percent of the stock was necessary to evidence good faith; that the undeveloped properties of the company would be retained for development at a later propitious time.

When Ives had acquired fifty percent of the stock holdings of the Aledo Group at $10.00 per share, Black sent the company plane from Great Bend to Illinois and Ives delivered the stock to Black at Great Bend. 25,000 shares of stock were immediately transferred, 10,000 to Edward Roos, 10,000 to Richard Gill, and 5,000 to Arthur Kincade. The proceeds of this sale in the sum of $248,750.00 were transferred to Ives' stock account in Aledo. The remaining 11,714 shares were placed in Black's lock box as street stock. $80,121.64 of Black-Marshall funds were

used to pay for this stock. It was first charged to Ives' account on the company books but was later charged to Black's account. The total purchase price was transferred to Ives' stock account in an Aledo bank from which the individual stockholders were paid at the rate of $10.00 per share. Apparently nothing further was said to the Aledo Group concerning the progress of the supposed sale, or for that matter, the progress of the company, until the following Summer of 1945, when Ives told the Aledo Group that the Black-Marshall Company had now been finally sold and that the stockholders should surrender the remainder of their stock to be paid at the rate of $12.00 per share.

Pursuant to these representations, the remainder of the stock was delivered to Ives and by Ives delivered to Black, who paid for it with Black-Marshall funds by a check to Ives who paid the stockholders from his stock account in the Aledo bank. At this point in the course of events Black had in his possession and in his lock box the 11,714 shares of street stock acquired in 1944, the remaining one-half of the stock of the Aledo Group, and also 15,000 shares of Gill and Kincade stock which he had purchased with company funds for $17.50 per share. At about the same time Black negotiated a $3,200,000 loan with the N.C.R.A. under which Black-Marshall agreed to drill twelve producing wells each year for five years for an additional loan of $22,000.00 for each producing well so drilled. The company continued to prosper under the accelerated drilling program.

In preparation for the sale of a majority of the company stock to the N.C.R.A. in 1947, Black retired 56,000 shares of the street stock held in his lock box and thereby balanced his account with the company for the purchase price. With the 11,714 shares of Aledo stock transferred to himself in 1946, he then held in his name or in the name of his family 62,126 shares which he sold to N.C.R.A. for $51.06 a share. In addition, 3,000 shares held by Ives as executor of the Boyd Estate were also transferred to the N.C.R.A. for the same consideration per share. This gave N.C.R.A. a controlling stock interest, and it thereupon proceeded to dissolve the corporation, the other stockholders having previously agreed to convey their interest in the assets to N.C.R.A. for an amount equal to the $51.06 per share. Under the agreement of sale some of the company assets which the N.C.R.A. did not wish

to acquire were sold to Black. The assets of the Landowners Oil Association were transferred to Black for the amount of the accounts receivable due the Black-Marshall Oil Company. From the total consideration of the sale of the stock to the N.C.R.A., Black and his wife received $234,928.74, Black individually $2,814,929.06, and Ives as executor of the Boyd Estate $135,930.00. In addition, an escrow fund of $497,819.21 was created of which Mrs. Black's interest was $39,123.29, Black's interest amounted to $357,224.50, and the Boyd Estate interest was $17,250.00.

It is suggested that Black purchased the stock upon the insistent demands of the Aledo Group; that he was hard put to find a buyer and this prompted him to use company funds to purchase the stock. It is true that in the Spring of 1944, Ives was being urged to find a market for the stock of some of the distressed investors and that Ives was in turn pressing Black for relief. And, it seems also fair to say that at that time Black was hard put to find a buyer for the stock. But it is also manifestly clear, we think, that sometime in May or June of 1944 Black did find a market, and that market was in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it in the effectuation of that plan. Henceforward Black became anxious to purchase all available stock, and Ives gathered in all of the stock of the Aledo Group and delivered it to Black, according to what we believe to be a well-laid plan. The whole course of events is inconsistent with the idea that Black purchased the stock in response to the sporadic demands of the stockholders.

It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct that Ives acted as his agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, "Although the principal may not have actually authorized the particular fraudulent act, yet he is respon-

sible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment." 2 Am. Jur., Agency § 363; see also Restatement Agency § 261; Anheuser-Busch v. Grovier-Starr Produce Co., 128 F. 2d 146; Cox v. Pabst Brewing Co., 128 F. 2d 468; Siedhoff v. Campbell, 141 Kan. 255, 40 P. 2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, "if those representations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized." 2 Am. Jur., Agency § 362; see also Restatement Agency §§ 257, 258.

Moreover, the record shows without much doubt that Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives' representations were brought home to Black.[1] In their brief

[1] Examples of Black's knowledge of Ives' misrepresentations to members of the Aledo Group and consequent ratification are: (a) Between the time the first one-half of appellants' stock was acquired and the acquisition of the second one-half, Black made the same general representations to Sherrard, specifically mentioning that only "producing properties" were being *sold*, and that undeveloped properties and Landowners were being retained "and this property that we weren't selling, we had to keep for a period of two years." (b) In the early Fall of 1945 when Dr. Wadleigh wrote Black inquiring into the details of the transaction, Black asked Ives what should be said. In response Ives wrote Black: "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing." (c) When the Constants inquired of Black on November 21, 1945, Black failed to make a true disclosure, but wrote the Constants that the details were so complicated he would have to talk with them

the appellees concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, "he ratifies who does not restore." Maryland Casualty Co. v. Beebe, 54 F. 2d 743, and cases cited. Black kept the stock with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account. The record is barren of any benefits to Ives.

Quite apart from the naked principles of agency, we think there are even stronger reasons for holding Black responsible for the misrepresentations which induced the Aledo Group to part with their stock. The evidence conclusively shows that Black himself stood in a position of trust and confidence to the Aledo Group and he cannot insulate himself from the fraud by denying Ives' agency. From the very beginning the Aledo investors entrusted their funds to Black with unlimited powers of management. When the Group was incorporated for the continuation of their joint venture, Black became the president, chairman of the board and chairman of the executive committee. True, some of the Aledo Group were made directors of the company, but they took no part in the management of its affairs. For all practical purposes Black was the corporation; he did with it as he saw fit, and the stockholders followed him with almost blind loyalty, as evidenced by the facility by which Ives was enabled to obtain almost fifty percent of their stock in 1944 and the remainder in 1945. Ives was, in the last analysis, only the conduit through which Black dealt with the Aledo Group. Having established this confidential relationship, he owed them the duty at least to be truthful with respect to all corporate transactions. Whether we apply the Kansas strict accountability rule, see Blazer v. Black,

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in person when he came to California "over the holidays". Conveniently, Black never looked up the Constants or made any effort to convey the true facts to them regarding the *sale*. (d) All acquired stock was kept in Black's lock box and was subject to his absolute control, yet he failed to take any steps to correct such misrepresentation, at a time when it would have been a simple matter to correct things with the shareholders. Indeed, with such knowledge, he transferred to himself under Certificate No. 398, 11,714 shares of stock which had been held in his lock box as street stock since 1944.

10 Cir., 196 F. 2d 139, or the less stringent rule applicable in Illinois, see Agatucci v. Corradi (Ill.), 63 N.E. 2d 630; Dunnett v. Arn, 10 Cir., 71 F. 2d 912, equity will not condone fraudulent representations under which one standing in a confidential relationship is enabled to take advantage of another. See Auer v. Wm. Meyer Co., et al., 322 Ill. App. 244, 54 N.E. 2d 394. In these circumstances, equity prescribes a standard of rectitude quite above the ethics of the bargaining counter. 54 Am. Jur. Trusts, Sections 220, 225 and 226; Securities and Exchange Commission v. Chenery, 318 U.S. 80; Manufacturers Trust Co. v. Becker, 338 U.S. 304. It will intervene to declare the wrongdoer a trustee and hold him accountable for the fruits of his inequitable conduct. Falk v. Hoffman (New York), 135 N.E. 243. In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945. Dunnett v. Arn, supra, at Page 920; Blazer v. Black, supra.

Appellees say that in any event the value of the stock of the company in 1944 and 1945 was not more than that which the Aledo Group received, and having received the full value of their stock they could have no complaint. The trial court so found and so held. But the value of the stock at the time it was fraudulently obtained is not the measure of relief in equity. Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages. Dunnett v. Arn, supra; Blazer v. Black, supra; Falk v. Hoffman, supra. In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it.

Reverting now to those parties to the suits who were specifically excluded from the trial court's affirmative findings of misrepresentation on the part of Ives, we must consider each claim upon its own factual footing and of course accord due weight to the negative findings of the trial court with respect to those particular parties. Hokin, Jones, Bowers, Nelson, Elving and Ogle did not appeal from the adverse judgment and their claims are not before us. With respect to the parties falling within this cate-

gory who have appealed and who may be classified as members of the Aledo Group, we ought to consider the correctness of the findings and conclusions of the trial court against the factual background of Ives' established relationship to the Group. It is important to keep in mind the fact that to most of the appellants he was a personal friend, attorney and confidant. And it was through this relationship that the Aledo Group was induced to purchase stock, first in the Petroleum Investment Company and later in the Black-Marshall Company; and it was through this same confidential medium that he was enabled to marshall one-half of the stock in 1944 and the other half in 1945, in consummation of what we hold to be Black's scheme to defraud. We have the oral and written word of Ives that he made the same representations to all of the Aledo Group of investors whom he contacted in the effectuation of the scheme. Indeed, the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance.

Ives had no direct contact with either Amen or Baldwin. Amen lived in Yankton, South Dakota. Baldwin lived in Rock Island, Illinois. All of their transactions with Black-Marshall were through Dr. Danford, a prominent member of the Aledo Group and a large stockholder. It was through Dr. Danford that both Amen and Baldwin were induced to purchase stock. Baldwin left his stock in Danford's lock box. Ives was an old and trusted friend of Danford, and when in June of 1944 Ives set out to acquire one-half of the stock of the Aledo Group he immediately contacted Danford and by false and fraudulent representations induced him to part with one-half of his stock. At the same time he induced Danford to procure Amen's and Baldwin's stock. Pursuant to these directions and representations, Danford did secure their stock along with his own. Whether Danford acted as Ives' agent or as agent for Baldwin and Amen, they undoubtedly relied upon Ives' false representations to Danford, and as we have said, Black is liable for the misrepresentations of his agent, Ives, to Danford. See Restatement, Agency, § 315.

Testifying in her own behalf, Edith Hall told substantially the same story as other appellants whose testimony was credited in the court's affirmative findings of misrepresentations. It is true that her memory failed her on

cross examination, but we have Ives' word that he made the same representations to her as to other members of the Aledo Group whose testimony has been credited in accordance with the established pattern of proof. We think there can be no valid exception to Mrs. Hall's claim when considered in the context of the whole record.

McBride did not testify in his own behalf and the only proof of actionable misrepresentation is Ives' general statement to the effect that he made the same representations to all of the Aledo Group, including McBride. In the absence of any direct proof of fraudulent misrepresentations or reliance upon the general pattern, we will not overturn the trial court's findings in that regard.

We hold, therefore, that appellants Amen, Baldwin and Hall are entitled to participate in the proceeds of the sale of the company in proportion to their equitable stockholdings at the time of the sale along with the other appellants as to whom the trial court found Ives made misrepresentations, and as to whom we have said Black was liable as responsible principal and unfaithful trustee.

Corporate Claims of the Stockholders and Co-Receivers

Appellees concede the dual capacity of the appellant-stockholders to seek the rescission of the sale of their stock to Black in 1944 and 1945 and the redress of corporate wrongs in the same action on the theory that upon rescission, the appellants become equitable stockholders with capacity to bring a derivative action on behalf of the corporation. And see Greer Investment Co. v. Booth, 62 F. 2d 321; Annotation, 168 A.L.R. 906, 914. It is suggested, however, that since the appellant-stockholders in their individual capacities, seek only a rescission of the sale of their stock to Black in 1944 and 1945 and do not seek to set aside the sale of the stock by Black to the N.C.R.A. in 1947, but instead seek to impress a trust upon the proceeds of that sale, they thereby affirmed the sale of the stock by Black, and having thus affirmed the sale, neither Black nor the appellants were thereafter either legal or equitable stockholders of the corporation; and not being stockholders were consequently without capacity to maintain the corporate causes of action.

When the appellants affirmed the sale of the stock to the N.C.R.A. in 1947 and recovered the proceeds from such sale, they indisputably ceased to be either legal or equitable stockholders and they obviously cannot there-

after assert a right of action as such. This is so, even though the wrongs complained of were committed while they were either legal or equitable stockholders. See Hanna v. Lyon, 71 N.E. 778; 3 Fletcher, Cyclopedia of Corporations, Sec. 1286, page 988. We therefore hold that the asserted corporate claims are not maintainable by these former stockholder-appellants. The question remains whether the corporate claims are maintainable by the receivers of this dissolved Illinois corporation.

The receivers of the corporation, standing as they do in the corporate shoes, have no greater right to sue or be sued than the corporation. From the date of its formal dissolution on July 1, 1947, the corporation ceased to exist as a legal person and was thereafter incapable of maintaining an action in the absence of enabling statutory authority. O'Neill v. Continental Illinois Co. et al, 93 N.E. 2d 160 (Ill. 1950); Oklahoma Natural Gas Company v. Oklahoma, 273 U.S. 257; United States v. Safeway Stores (10 Cir.), 140 F. 2d 834. Parg. 157.94 of the Illinois Business Corporation Act of 1933 (Chap. 32, Ill. Rev. Stat. 1949) provides that: "The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name."

The manifest purpose of Parg. 157.94, supra, was to provide a grace period for winding up the affairs of the dissolved corporation during which it could sue and be sued on rights and liabilities incurred before dissolution. 16 Fletcher, Cyclopedia of Corporations, Sec. 8158, page 916; United States v. Safeway Stores, supra. But the statute is not one of limitations but a condition upon a right of action. See O'Neill v. Continental Illinois Co., supra, page 165. And the statutory words, "any remedy available . . . for any right or claim" necessarily embraces a right of action sounding in fraud.

The co-receivers' action was commenced on July 14, 1950, more than two years after dissolution, and is not within the two-year statutory grace period. The co-receivers intervened in the abortive stockholders' suit commenced within the two-year grace period, but at the con-

clusion of the evidence in the consolidated cases, they elected to stand on their original action. The election was coercive, but no point is made of it on appeal, and the receivers must therefore stand on that suit.

But even so, the order appointing the receivers specifically set aside and rescinded the corporate dissolution and adjudged it a nullity "for all purposes" until further order of the court. A copy of the order vacating the dissolution was forwarded to the Secretary of State of Illinois and the receivers were authorized and directed "to take all action that may be necessary or proper in this regard." On this record, that order is final and subsisting. It is a judgment of a court of competent jurisdiction of the parties and subject matter, is not void upon its face, and is therefore invulnerable to attack here. 16 Fletcher, Cyclopedia of Corporations, Sec. 7764, page 223; 19 C.J.S., Corporations, Sec. 1693, pp. 1460-1; Town of Vandalia et al v. St. Louis, V. & T. H. R. Co. et al (Ill.), 70 N.E. 662; Blanchard Bro. & Lane v. S. G. Gay Co. et al (Ill.), 124 N.E. 616; Miller v. Union State Inv. Co. et al (Ill.), 61 N.E. 2d 764; Badger v. Hoidale (8th Cir.), 88 F. 2d 208. Indeed, no attack is made upon it in these proceedings. We conclude that Parg. 157.94 is inapplicable to these asserted causes of action by the co-receivers, and that the corporate causes are maintainable by them.

* * *

We come, then, to the corporate claim to the effect that Black surreptitiously and fraudulently procured the issuance to him of 32,457.50 shares of the corporation's common stock which he sold to the N.C.R.A. for $51.06 a share, and for which he is a constructive trustee and should be required to account. Black has denied these allegations and pleaded laches and the analogous limitations. It is incumbent upon the receivers, therefore, standing in the shoes of the corporation, to prove the claims of fraud by convincing evidence.

The facts leading up to the organization of the corporation in January of 1940 and the issuance of the stock are reasonably clear to the effect that sometime in the early Fall of 1939 Black discussed with Ives his plan to organize a corporation so that they could operate "as a company instead of as an individual." In November of 1939, Black proposed to the board of directors of Landowners Association to take 4,000 shares of preferred and 40,000 shares of common stock of the proposed corpo-

ration in full payment of the properties held by Black and "his associates" to be transferred to the corporation, including the five Barton County, Kansas oil and gas leases. When the corporation was organized by Ives in Aledo in January, 1940, these five Barton County, Kansas oil and gas leases were formally transferred to the corporation. The properties of Landowners were also transferred in consideration of 20,000 shares of common and 2,000 shares of preferred stock of the newly formed corporation. The number one stock certificates for 10,000 shares of common stock and 1,000 shares of preferred stock were issued to Black. Certificates numbered two for like amounts were issued to Marshall; certificates numbered three for like amounts were issued to Boyd; and certificates numbered four for like amounts were issued to Ives. At the same time the Aledo Group were issued preferred and common stock on the basis of one share of common stock for each $2.00 invested with Black prior to the formation of Black-Marshall and one share of preferred stock for each $4.00 so invested. These certificates were signed by Black as president and Ives as secretary. Certificates numbered 5 to 14, inclusive, in the total amount of 64,870 shares of common stock were issued to "W. H. Black et al" and signed by Black but not by secretary Ives. Revenue stamps were affixed and cancelled. When one of the former stockholders in the Landowners Group discovered that this large block of stock had been issued to "Black et al", he complained of the issuance of the stock as a violation of the preorganization agreement fixing the ratio of the stock ownership in the new company based upon the respective properties transferred. Sometime thereafter these stock certificates (5 to 14, inclusive) were repasted into the stock book. No one came forward to say who issued the certificates, under what circumstances, or who repasted them in the stock book. The stubs were not in secretary Ives' handwriting. Black testified that upon the formation of the corporation he signed all of the stock certificates in blank and could not explain how they happened to be issued to him. He denied that they had been validly issued to him, or for that matter that they had been validly issued at all.

The minutes of the first annual stockholders meeting held at Aledo, Illinois, January 17, 1941 over which Black presided, showed that he owned 11,000 shares of the corporation stock (1,000 shares of preferred and 10,000 shares

of common). Apparently, however, immediately after that meeting the "Black et al" stock was reissued as certificates numbered 155 to 166, inclusive. Each certificate, signed by Black as president and Ives as secretary, contained a notation "correction of name only". When Black was pressed for an explanation concerning the circumstances under which the 64,870 shares of stock were reissued to him, he simply stated "I don't propose to explain it, because I can't explain it, sir."

Black now contends that the 64,870 shares of stock were issued to him and Marshall in consideration of the transfer of the five Barton county oil and gas leases which they had acquired and partially developed as a partnership, independent of the Aledo investors. But the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common and 4,000 shares of preferred stock and that this same amount of stock was represented by the first four certificates issued to Black, Marshall, Boyd and Ives. They thereby received the full consideration for the five leases in accordance with the preorganization agreement. There is no evidence whatever that Black contributed anything else to the corporation for which he and Marshall would be entitled to receive 64,870 shares of stock. We do not understand anyone to so contend. Moreover, the evidence shows without dispute that beginning in the early fall of 1939, the Aledo Group transmitted funds to Black through Ives and that these funds were used for the acquisition and development of the five leases. It is true that the Esfeld lease was acquired in July and a well drilled thereon during which time Black did not receive any funds directly from the Aledo Group. And Black undoubtedly used outside funds with which to acquire the lease and drill a well thereon. But the record is also clear that Black acknowledged the Aledo Group's interest in all of these leases. On December 7, 1939 he made a detailed report to Ives of monies received and spent in the acquisition and development of these valuable leases. The report showed that as of that date the Aledo Group had contributed $17,650.00 of a total of $24,000.00 expended. $8,000.00 ($3,000.00 for the Krier lease and $5,000.00 on a drilling contract) was due and unpaid and apparently was assumed by the corporation upon its organization in January, 1940. Other sums were contributed by the Aledo Group between December 7, 1939 and the date of organization of

the corporation; and in answer to interrogatories, Black acknowledged receipt of approximately $30,000.00 from the Aledo Group, all of which was used in the acquisition and development of these five leases.

From these facts it is clear that each party received stock consideration for his investment in accordance with the preorganization agreement. The Landowners Association received their stock; Black, Marshall, Boyd and Ives received their stock for their interests in the Barton County leases; the Aledo Group received stock for their investment; and the 64,870 shares, of which 32,457.50 were issued to Black and sold to N.C.R.A., could be nothing but purely promotional stock. And it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black.

The question, then, is whether the asserted corporate claims are barred by the Kansas statute of limitations or analogous laches.

Under the Kansas statute, an action for relief on the grounds of fraud may be brought at any time within two years after accrual; and it does not accrue until the discovery of the fraud (Sec. 60-306, Kan. Gen. St., 1949) meaning the "discovery of such facts as would on reasonable diligent investigation, lead to knowledge of the fraud." Sauberli v. Sledd (Kan. 1936), 55 P. 2d 415, 419, and cases cited; Dalton v. Hill (Kan. 1950), 219 P. 2d 710, 716; Lewis v. Duncan (Kan. 1903), 71 Pac. 577. And while this suit is in equity invoking equitable remedies, the statute of limitations governing relief on the grounds of fraud is applicable rather than laches, notwithstanding what we said in Blazer v. Black, 196 F. 2d 139, 147. See Dalton v. Lawrence Nat. Bank (Kan. 1950), 219 P. 2d 719; Guilfoyle v. Brown (Kan. 1939), 88 P. 2d 1082; Hughes v. Reed (10 Cir.), 46 F. 2d 435; Curtis v. Connly, 257 U.S. 260, 66 L. Ed. 222, 42 S. Ct. 100; Annotation, 174 A.L.R. 1217, 1226, Sec. 5; 34 Am. Jur., Lim. of Actions, § 59, page 55; 41 Col. L. Rev. 686, *The Statute of Limitations in Suits to Remedy Corporate Abuse;* 47 Yale L. Journ., No. 6, 1004, *The Statute of Limitations as Applied to Stockholders' Derivative Suits.*

The appellees earnestly insist that the corporation had full notice and knowledge of the issuance of the challenged stock in consideration of the Barton County leases; that such knowledge was revealed to the stockholders and directors in each annual audit report, copies of which were

circulated to all of the stockholders and directors; that the minutes of each stockholders meeting subsequent to 1941 showed Black as the owner of the full amount of the challenged stock. That with such knowledge the corporation, by the affirmative acts of its stockholders and board of directors, approved and ratified the issuance of this stock, and that the corporation cannot now be heard to deny the knowledge of the fraud within the applicable limitations.

It is true that the first annual audit report of the company for the fiscal year ending July 31, 1940 and each succeeding audit report for the fiscal years from 1941 through the last eleven-month period ending June 30, 1947, showed as a part of the history of the corporation, the board of director's authorization for the issuance of 9,055 shares of preferred stock of the company and 122,500 shares of the common stock of the company, in exchange for the five Barton County, Kansas oil and gas leases. This authorization also included the assumption by the company of a liability existing against said leases in the amount of $8,827.93. And it is also true that the books of the company showed the fluctuations in stock ownership in Black from 11,000 shares (10,000 shares of common and 1,000 shares of preferred) in 1941 to 70,000 shares in 1942; then to 52,816 shares in 1943; 46,057 shares in 1944; 46,057.50 in 1945; the same amount plus 6,804 shares held jointly with his wife in 1946; and 6,804 shares in 1947, during which year the N.C.R.A. owned a majority of the authorized stock of the corporation. The minutes further revealed the adoption of a resolution by the board of directors in December of 1944, authorizing the company to purchase 38,978 shares of Deering J. Marshall stock, and the amendment of the by-laws authorizing Black, as president of the corporation, to purchase on behalf of the corporation all or any part of the outstanding capital common stock of Black-Marshall for the account of the corporation to be used as treasury stock or to be retired on the books of the company.

Unquestionably a corporation is chargeable with actual and constructive notice and knowledge of that which was brought home to it in the administration of the affairs of the corporation as reflected by its books and records; and it is charged with any information disclosed from an inquiry prompted by the face of the record. Farmer v. Standeven, 93 F. 2d 959 (10 Cir.); Connell v. Sinco Oil Co. (Kan. 1950), 223 P. 2d 1020. And notice to an officer of

the corporation in the line of his duty is usually notice to the corporation. Curtis v. Connly, supra; Hughes v. Reed, supra.

Black, of course, had notice and knowledge of the fraud from its inception, but such notice or knowledge is not imputable to the corporation, for he was certainly acting outside the scope of his authority and in direct derogation of the interests of the corporation. Indeed, the presumption is that he concealed such knowledge rather than that he communicated it to the corporation. 3 Fletcher, Cyclopedia of Corporations, Sections 819 and 820. There is nothing on the face of the minutes, audit reports, or records of the company to show that of the 122,500 shares of common stock of the company issued in exchange for the five Barton County leases, 64,870 shares were issued to Black for his and Marshall's interests therein. And there is nothing on the face of the records of the company to show that the stock listed in Black's name represented 32,457.50 shares of stock issued to him in consideration of his interest in these leases.

The audit reports did incite inquiry. Director James, acting on behalf of the Landowners' Group of stockholders, challenged the legality of the issuance of the 122,500 shares in exchange for the five Barton County leases in the early part of 1941 as violative of the stock ratio fixed in the preorganization agreement. His concern was in behalf of the Landowners' Group whose stock ownership was diminished by the issuance of the stock to Black. In explanation Ives suggested that all five of the leases were not included in the original agreement and that the additional stock was issued in exchange for the Hoffman and Krier leases. But this explanation was contrary to the facts, and indeed contrary to the recitations in the audit reports. The record shows that after the Landowners' Group challenged the issuance of this stock, James met Black in Wichita where Black made peace with him and his associates. The record does not indicate what arrangements were made between them. It does indicate that James resigned as director of the company in January, 1943, and that he and Black thereafter dealt in the stock of the company on friendly terms.

There were members of the Aledo Group on the board of directors throughout most of the history of the company until their stock was sold in 1945. There is nothing on this record to indicate that any of these directors or stock-

holders had actual notice of the inquiry conducted by James for the Landowners' Group or that any of them were moved to make any inquiry concerning the issuance of the stock or Black's ownership of the large quantity of stock appearing in his name on the stockholders' list at the annual stockholders' meetings. The audit reports, the minutes of the meetings and all other corporate records were available to all of the stockholders and directors. Indeed, the audit reports were circulated among and approved by the stockholders and by the directors. It may be suggested with good cause that the Aledo directors were put on the same inquiry as the Landowner's Group and that a reasonably prudent inquiry would have disclosed all of the facts relating to the issuance of the challenged stock to Black.

Undoubtedly one of the most important determinants of reasonable diligence for the purpose of discovery and accrual is the relationship of the parties. It is established Kansas law that the directors or officers of a corporation are not trustees of an express trust as to whom the statute of limitations is inapplicable, at least until repudiation; but they do stand in a fiducial relationship of trust and confidence to the corporation and its stockholders, and may be held to strict accountability as trustees of an implied or constructive trust resulting from fraudulent transactions with the corporation or its stockholders. Dalton v. Lawrence National Bank, supra; Hotchkiss v. Fischer (Kan. 1932), 16 P. 2d 531; Federal Reserve Life Ins. Co. v. Gregory (Kan. 1931); 294 Pac. 859; 3 Fletcher, Cyclopedia of Corporations, § 838, Pages 173-187. The duty to exercise reasonable diligence to discover fraud on the corporation by its fiduciaries certainly ought to be judged in the light of the duty of such fiduciaries to strictly account to the corporation touching their stewardship. Dalton v. Lawrence Nat. Bank, supra; Hotchkiss v. Fischer, supra. And see Marcus v. Otis (2d Cir.), 168 F. 2d 649. The law does not require one to suspect his fiduciary. Surely no one would contend that the Kansas statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust and confidence. Indeed, some courts excuse the failure to use diligence in the face of a relationship of trust and confidence rendering it the duty of the party committing the fraud to disclose the truth to the other. Auer v. Wm. Meyer Co. (Ill. 1944), 54 N.E. 2d 394. And there is very respectable authority for saying

that the statute of limitations is "tolled while a corporate plaintiff continues under the domination of the wrongdoers." See Michelsen v. Penney (2d Cir.), 135 F. 2d 409; 39 Col. L. Rev. 842, *The Statute of Limitations in Stockholders' Derivative Suits Against Directors.* In the language of the Kansas court, "A party, even though his suspicions have been aroused, may well be lulled into confidence, and take no action by such representations as were made. Dalton v. Hill 219 P. 2d 710, 716. And, "Only where a party defrauded would plainly have discovered the fraud except for his own inexcusable inattention, will he be charged with a discovery in advance of actual knowledge on his part." Connell v. Saco Oil Co., 223 P. 2d 1020, 1027. See also Dalton v. Lawrence Nat. Bank, supra. In any event, it would be purely fictional and wholly inadmissible to require the corporation to suspect and investigate its president and dominant officer.

It is in this setting that we must ultimately judge whether the corporation discovered or should have discovered the fraud within the two years next preceding the bringing of this suit. Black not only occupied the position of director and dominant officer, he was a promoter of the corporation, in which capacity he also sustained a fiducial relationship which forbade him under penalty of strict accountability to take any unfair advantage or reap any secret profits to the detriment of the corporation or the stockholders. 1 Fletcher, Cyclopedia of Corporations, § 193; 13 Am. Jur., Corporations, § 115, page 254.

There can be no question of Black's complete domination of the corporation from its inception until he sold his stock to N.C.R.A. Nor can there be any question that Black acquired the 64,870 shares of promotional stock under circumstances which he never disclosed to the stockholders or the directors during the entire history of the corporation, and which he could not explain from the witness stand. We do not believe that the recitations in the audit reports or the information on the stock lists were sufficient to give either actual or constructive notice to the corporation of his fraud in the acquisition of the stock. The proof is that actual notice of the circumstances under which the stock was issued was not discovered until within two years before the suit was commenced, and it is therefore not barred.

We hold that the 32,457.50 shares of stock of the company issued to Black and sold by him to the N.C.R.A. in 1947

belonged to the corporation, and Black should be required to account. We cannot determine the exact value of that stock in relation to the total amount of stock entitled to participate in the proceeds of the sale of the company for we cannot determine from this record the total amount of stock entitled to participate in the sale. We do know that a part of the stock of the Aledo Group entitled to participate was retired prior to the 1947 sale. The participation of the retired stock in the sale of the company would pro tanto diminish the sale price of each of the shares of stock entitled to participate in the sale. These computations we must leave to the trial court.

Corporate Claims for Personal Profits Realized By Black From the Use of Corporate Funds

During the early history of the company, Black advanced money and credit to the company for the development of its properties. During the most prosperous days of the company, and particularly after the loan from the N.C.R.A. in 1945, Black borrowed large sums of money from the company with which he purchased company stock, a farm in Illinois, a commercial tuna boat on the West coast, and engaged in other commercial ventures for personal profit. The receivers, contending that these borrowings were unauthorized and illegal under the by-laws of the corporation, seek an accounting from Black for the profits realized from the use of corporate funds.

At all times from the inception of the company the company books reflected Black's advances to and from the company. A regular quarterly meeting of the board of directors on September 26, 1947 approved the advances to or for the account of Black in the sum of $1,293,009.59 prior to August 1, 1946. The trial court made specific findings for each year based upon the books of the company, to the effect that on June 30, 1947 Black owed the company $591,064.07 which he paid by his personal check at the time of dissolution. In 1946 the corporation had actual and constructive knowledge of these advancements and of Black's heavy indebtedness to the company. When Black settled his accounts with the corporation on June 30, 1947 the directors and the stockholders had knowledge of and necessarily approved Black's borrowings from the company. The Illinois statute makes it a criminal offense to vote for the making of a loan to an officer or director of the corporation. Ill. Rev. Stats. (1953) Chap. 32, Sec. 157.42(h). And the director of a corporation who

votes for the making of a loan to an officer or director is jointly and severally liable to the corporation for the amount of such loan until repaid. Ill. Rev. Stats. (1953) Chap. 32, Sec. 157.42(d). But while it may be criminal to vote for the making of a loan and the directors may be liable to the corporation for its repayment, it does not neeessarily mean that such loans are fraudulent or that a director is accountable to the corporation for the profits from such loans. 3 Fletcher, Cyclopedia of Corporations, § 955. These transactions are further evidence that Black dealt with the company as his own and without let or hinderance from the stockholders or other directors. But the trial court concluded that they had been approved and ratified by all of the stockholders of the corporation in June of 1947, and we will not say that the court's judgment in that respect is clearly erroneous.

The fourth and last corporate claim complained of Black's self-dealings with the corporation to its detriment and to the benefit of himself and Mrs. Black. Sometime in 1945 Black and A. W. Kincade caused the Ferrell-Young Drilling Company to be organized with Young, Ferrell, Mrs. Black and Mrs. Kincade as equal partners. This drilling company drilled wells for the Black-Marshall Oil Company and engaged in other drilling operations. Mrs. Black's reportable income from the partnership in the year 1946 was $38,000.00. In dealing with the corporation, Mr. and Mrs. Black were of course one and the same party. And equity will scrutinize the transactions of a fiduciary with a corporation in matters of this kind with extreme care to make sure that the transactions were at arms length and that the corporation suffered no detriment. Winger v. Chicago City Bank & Tr. Co. (Ill. 1946), 67 N.E. 2d 265; 3 Fletcher, Cyclopedia of Corporations, § 924, pp. 357-60. But the law does not forbid corporate officers from dealing with the corporation merely because they are such. Such transactions are not inherently dishonest or invalid for that reason alone. 3 Fletcher, Cyclopedia of Corporations, § 885, page 283; § 913, page 329; § 917, page 337. The record shows without dispute that it is the custom for companies like Black-Marshall to independently contract for the drilling of their wells and that the Ferrell-Young Drilling Company was paid the prevailing price in the field for its drilling operations; that Ferrell and Young were experienced drillers and that it was to the interest of the corporation to have the benefit of their experience in the

corporation's drilling operations. While the trial court did not make findings in that respect, we take the view that the transactions were not fraudulent and that the corporation suffered no detriment, and we will not require Black to account.

Black was also the owner of a "drilling-in unit" which he rented to the company on a per diem basis, but the evidence shows without dispute that the rental was fair and in accordance with the prevailing practice at that time and place, and Black is not required to account for his profits.

In 1945 and 1946, Black, acting as president and managing officer of the corporation, conveyed undivided interests in oil and gas leases of Black-Marshall to A. W. Kincade with the express understanding with Kincade that Kincade would account to him for a half interest in the profits derived from these properties and that upon demand he would convey an undivided one-half interest in such properties. And other undivided interests in other properties were conveyed to Mrs. Black. None of these properties were sold to N.C.R.A. and in 1948 upon demand Kincade conveyed an undivided one-half interest to Black. There can be no doubt of the fraudulent character of these particular transactions. Black first denied it, and then admitted it, and he should be required to account.

Finally the receivers seek to recoup the profits realized by Black from the sale of company properties to William F. Pielsticker for Black's account. After the N.C.R.A. had become the dominant stockholder in the company and the stockholders had voted on June 27, 1947 to voluntarily dissolve the corporation, a special meeting of the board of directors passed a resolution providing "that all accounts receivable due the Black-Marshall Oil Company by the Landowners Oil Association and all stock in the Landowners Oil Association be sold to Wm. F. Pielsticker for the sum of $53,183.91; that all producing gas leases in Kearny County, Kansas, and all oil and gas leases and mineral interests in the State of Texas owned by the Black-Marshall Oil Company be sold to Wm. F. Pielsticker for the sum of $58,115.10; and that one model D-18 Beechcraft twin engine airplane be sold to Wm. F. Pielsticker for the sum of $46,152.56." While the record does not show the exact manner of payment for these properties, it does speak of a Voucher No. 6-428 dated 6-30-47 reciting the "sale of the properties to Pielsticker for $157,451.57 based

on values shown in Bradley report at 3-31-47. Selling price as provided in minutes of directors 6-30-47." The minutes of the board of directors meeting authorizing the sale were apparently attached to the voucher together with a schedule showing the cost of the Kearny County gas properties in excess of $47,633.71 "to be charged to Pielsticker in exact amount." These properties were not transferred to the N.C.R.A. and apparently were not included in the valuation of the properties for the purpose of determining the sale price for the stock sold to the N.C.R.A.

These properties were sold in contemplation of corporate dissolution. They were sold to Pielsticker admittedly for Black's account, so that it may be said that Black was in reality the purchaser. We can see nothing inherently dishonest or fraudulent in Black's purchase of the corporate properties on dissolution provided that he paid full value therefor. The record shows that the cost basis for the Kearny County gas properties to the corporation was $47,633.71 and that they were sold to Pielsticker for Black's account for $39,449.78, but there is nothing in this record from which we can determine that the properties were worth more than their sale price. Indeed, there is nothing in the record to show or tending to show that any of the properties sold to Pielsticker were worth more than what he paid for them. But even so, they were sold by the corporation in pursuance of a resolution of the board of directors setting out the exact amounts for each of the properties sold. There was nothing secret or surreptitious about the transaction except the properties were bought by Pielsticker for Black's account, and while the reasons therefor do not appear, we think it immaterial if, as we have seen, the corporation received full value for the properties sold. It is significant, also, that the properties were sold after the N.C.R.A. had become the dominant stockholder and was in the process of dissolving the corporation. It was of no concern to the corporation who acquired the properties if full value was paid. No accounting on these particular transactions is indicated.

The judgment of the trial court is REVERSED and the causes REMANDED with directions to proceed in accordance with the views herein expressed.

PHILLIPS, *Chief Judge*, dissenting:

I respectfully dissent from that part of the opinion which holds that the receivers of the Black-Marshall Oil Company[1] were entitled to recovery in part on the corporate cause of action, for the reason that, in my opinion, the corporate cause of action was wholly barred by the Kansas statute of limitations and by laches.

In January, 1940, certificates of stock in BM were issued to Black, et al.[2] covering an aggregate of 64,870 shares. The original five directors of BM were Black and Marshall and three members of the Aledo group: Ives, Boyd and Stevenson. At the next annual meeting of the stockholders, held in January, 1941, Black and Marshall and five members of the Aledo group; namely, Ives, Stevenson, Berglund, L. E. Robinson and Sherrard were elected to the board of directors. At the annual meeting of the directors, also held on January 17, 1941, an audit report covering the first fiscal year, ending July 31, 1940, was examined and approved. Such audit report showed that on January 20, 1940, the board of directors authorized the issuance of 122,500 shares of common stock, which included the 64,870 shares of stock to Black and Marshall, in exchange for five leases and the assumption by the corporation of liability existing against the said leases in the amount of $8,827.93. At the next annual meeting of the board of directors, held in January, 1942, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo group and Allen James of the Chicago group, an audit report for the period ending July 31, 1941, was examined and approved. That audit report also showed the issuance of the above mentioned shares. At the next annual meeting of the board of directors, held in January, 1943, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo group and Ranney of the Chicago group, an audit report for the year ending July 31, 1942, was examined and approved. That report also showed the issuance of the above mentioned

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[1] Hereinafter referred to as BM.

[2] Marshall was the beneficial owner of approximately half of such stock.

stock. Like audit reports, examination and approval covering subsequent years were presented, examined and approved at stockholders' meetings held in January and December, 1944.

The minutes of the annual meeting of the stockholders of BM, held on January 20, 1942, which were read and approved at the annual stockholders' meeting in 1943, showed Black as the owner of 70,000 shares. The same may be said with respect to the minutes of the stockholders' meeting, held on January 27, 1943, which were read and approved at the stockholders' meeting in January, 1944.

At the annual meeting of stockholders held on December 6, 1944, the stockholders adopted a resolution authorizing a purchase from Marshall of 38,978.75 shares held by him and on the same day the board of directors adopted a like resolution and a written contract was entered into for the purchase of such shares from Marshall.

Finally, many of the audit reports referred to above were furnished to a number of persons embraced in the Aledo group.

It seems to me that the written records referred to above conclusively establish that the directors and stockholders knew in December, 1944, and prior thereto that the 64,870 shares of stock had been issued to Black and Marshall in exchange for their interest in the Kansas leases.

The trial court found that the 64,870 shares were issued to Black, et al. for the partnership interest of Black and Marshall in the original five Kansas leases and that the corporate records reflected that fact.

The trial court, in addition to its specific findings of fact, found all other issues of fact in favor of the defendants and against the plaintiffs.

The corporate cause of action was commenced by the receivers on July 14, 1950, at least more than six years after the directors and certainly many of the stockholders had full knowledge of the fact that the 64,870 shares had been issued to Black and Marshall.

For the reasons indicated, it is my opinion that the corporate cause of action, insofar as it was predicated on the issuance of such 64,870 shares of stock, was barred by the statute of limitations and by laches.

JUDGMENT—(Vacated by order of May 4, 1956)

Eighth Day, November Term, Friday, November 25th, 1955.

Before Honorable Orie L. Phillips, Chief Judge, Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby reversed, that these causes be and the same are hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that appellants have and recover of and from appellees their costs herein and have execution therefor.

ORDER WITHDRAWING OPINION FILED NOVEMBER 25, 1955, AND VACATING JUDGMENT ENTERED NOVEMBER 25, 1955

Eighteenth Day, March Term, Friday, May 4th, 1956.

Before Honorable Orrie L. Phillips, Chief Judge, Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

It is now here ordered by this court that the opinion of the court filed November 25, 1955, be and the same is hereby withdrawn, and that the judgment entered November 25, 1955, be and the same is hereby vacated.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 4962, 4963, 4964—March Term, 1956

Appeal from The United States District Court For The District of Kansas

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A. M. AMEN, et al, APPELLANTS,

vs.

WILLIAM H. BLACK, APPELLEE.

A. M. AMEN, et al., APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

D. ARTHUR WALKER and FRED D. WINDISH, Co-Receivers of Black-Marshall Oil Company, APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

(May 4, 1956)

D. Arthur Walker and Martin M. Lucente (Jack O. Brown, Burrel Barash, Robert Martin, Edward G. Knowles, W. F. Lilleston, Douglas F. Smith and Henry V. Gott were with them on the brief) for Appellants;

Malcolm Miller (George B. Powers, Carl T. Smith, John F. Eberhardt, Stuart R. Carter, Robert C. Foulston, Robert N. Partridge and Robert M. Siefkin were with him on the brief) for Appellees.

Before PHILLIPS, *Chief Judge,* and MURRAH, *Circuit Judge, and* WALLACE, *District Judge.*

MURRAH, *Circuit Judge.*

Stripped of their duplicity and redundancy, the pleadings in these consolidated cases state four separate contested claims with a common factual background.

The first is a suprious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it, he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

The second stated claim is in the nature of a derivative action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders.

The third claim asserted by the corporate receivers is for a recovery of the profits allegedly realized by Black and his wife from the use of company funds in personal business ventures. The fourth claim is also for proceeds realized by Black in transactions in which company funds were used for personal profit. This appeal is from a judgment of the trial court in favor of the defendants on all tendered issues.

A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23(a)(3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The appellees challenge the pro-

priety of the suit as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.

The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. Shipley v. Pittsburgh & Lake Erie Ry Co., 40 F. Supp. 870; Dickinson v. Burnham, 2 Cir., 197 F. 2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted: See Vol. 3, Moore's Federal Practice, p. 3448.

In a similar action by one of the Aledo Group of investors, we sustained the maintainability of the suit and thought that the plaintiff's proof standing alone showed that "Black did devise a scheme to defraud the stockholders of Black-Marshall . . . and that Ives was Black's agent in the perpetration of that scheme." Blazer v. Black, 10 Cir., 196 F. 2d 139. Based upon substantially the same pattern of proof, the trial court in this case made separate findings of fact with respect to the claims of specifically named appellants in which it found that in the summer of 1944 Ives falsely represented to these named appellants that the producing properties of Black-Marshall were being sold for an amount sufficient to yield the stockholders $10.00 per share; that the undeveloped properties of the company were being retained for development at a later propitious time; and that the stockholders should surrender fifty percent of their stock in order to bind the transaction. The court further found that in 1945 Ives falsely represented to the same appellants that the producing properties of Black-Marshall had been sold for which they should surrender the remainder of their stock for $12.00 per share. These representations were conced-

edly false and undoubtedly induced the stockholders to part with their stock. The trial court further found, however, that Black did not solicit Ives to make such false representations and had no knowledge that they were being made as an inducement for the surrender of their stock. It was upon this basic finding that the trial court concluded that Ives was not Black's agent in the procurement of the stock; that Black was not therefore legally responsible for the false representations; and that he made no fraudulent representations to any of the plaintiffs and did not practice any fraud on any of them.

With respect to certain other specifically named appellants, hereafter noted and treated, the trial court found that no representations of any kind were made by anyone to induce them to part with their stock.

We first consider whether Ives' false representations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. United States v. United States Gypsum, 333 U.S. 364; United States v. Waymire, 10 Cir., 202 F. 2d 550; McAllister v. United States, 348 U.S. 19; United States v. Oregon Medical Society, 343 U.S. 326.

The pertinent facts are that in 1938, Black, an oil promoter, went to Aledo, Illinois where he met a well-respected lawyer named Ives. Through Ives he met some of the appellants, business and professional men and women living in and around Aledo. As a result of these contacts, Black, with Ives as his lawyer, formed the Petroleum Investment Company, a voluntary association through which Black entered into separate contracts with the investors providing in substance that Black would use the funds entrusted to him by the respective investors in exploration for oil. The contracts in identical terms provided that Black would receive one-fourth of the profits from the ventures and that he would have unlimited powers of management of the affairs of the respective ventures.

Acting through Ives as his attorney and agent, Black received approximately $21,000.00, most of which came from the appellants herein. These funds were unsuccessfully invested in several oil ventures in Southern Illinois. In the

early part of 1939, Black left Aledo apparently for California. While enroute, he was involved in an automobile accident and awoke in a Tulsa, Oklahoma hospital to find Deering J. Marshall at his bedside. He had had previous dealings with Marshall, and while convalescing in Tulsa, he and Marshall made arrangements to acquire some oil leases in Barton County, Kansas. The first lease, known as the Esfeld, was acquired by Marshall as a farmout from the Sohio Oil Company with funds furnished by Black. A producing well was completed on the lease in the early part of July. Thereafter Black and Marshall working together acquired four other leases in Barton County, Kansas, known as the Weber, Dolechek, Hoffman and Krier. These leases were partially developed as producing properties during the latter part of 1939.

While the leases were being acquired and developed, Black commenced negotiations with the Landowners Oil Association, composed of a group of Chicago investors, looking toward the pooling of the resources of the two companies into a corporation, the stock of which would be divided between the investors in the two groups based upon the value of their respective assets. During all of these negotiations Black kept Ives advised of all developments, including the five oil and gas leases in Kansas, and on December 7, 1939 rendered a financial statement to Ives setting out the receipt of the money from the Aledo Group, its investment and results.

Pursuant to plan, the Black-Marshall Oil Company was incorporated by Ives on January 3, 1940 as an Illinois corporation with an authorized capital of 20,000 shares of cumulative preferred stock with a par value of $10.00 and 200,000 shares of no par common. Stock was issued to the Aledo investors on a basis of one share of common for every $2.00 invested and one share of preferred for every $4.00 invested, including the amounts invested in the unsuccessful Petroleum Investment Company ventures in Southern Illinois. The five producing leases in Barton County, Kansas, together with other unproductive holdings were transferred to the corporation by Black and his associates, and the assets of the Landowners Association were also transferred to the corporation in consideration of 2,000 shares of preferred and 20,000 shares of common stock of the newly formed corporation. Black, Marshall and Ives were each issued 10,000 shares of common and 1,000 shares of preferred. At the first stockholders meet-

ing in Aledo, Black was elected president, chairman of the board and chairman of the executive committee, and Ives was elected secretary and treasurer. Both acted in these capacities from the organization of the corporation to its dissolution upon the sale of its outstanding stock in 1947 to the National Cooperative Refinery Association. Some of the appellants here became directors of the corporation and remained such throughout the life of the corporation. The company first maintained offices in Wichita, and later in Great Bend, Kansas, near the location of the producing properties. The minute books of the corporation were kept by Ives in Aledo where the first meetings were held, but were later moved to Great Bend, Kansas where the company offices were maintained.

The productive leases in Kansas were developed from 1940 to 1944 primarily with bank loans negotiated by Black with company credit and security. The leases were prolific and at the January, 1944 board meeting in Aledo, there was considerable agitation for a dividend or at least a partial return of investment in some form. Black explained that no dividends could be paid while the drilling program was under way, and that in any event it would not be advisable taxwise because the drilling operations were being carried on largely with tax money. Several resolutions and substitute resolutions were offered looking toward a partial realization upon the investment. Finally a resolution was adopted authorizing Black to negotiate a sale of the producing properties for an amount to yield the stockholders at least $8.00 per share and providing that the nonproducing properties would be retained for future development. Thereafter, and in the Spring of 1944, Black attempted to sell the producing properties of the company and entered into a tentative arrangement with N.C.R.A. for a loan secured by fifty-one percent of the company. When these negotiations failed, Ives wrote Black on May 14, 1944 expressing his regrets and also expressing the hope that they could make "some kind of a deal so that we can pay them [the stockholders] some money by the first of June, as they are expecting something at that time." He went on to say, "I am going to send you 440 shares of common stock which I purchased for you at $10.00 per share, but the owner must have his money by the 30th day of May", and that "I may be able to buy more of the stock at that price if you want it." A few days later, Black wrote Ives outlining his negotiations

with N.C.R.A. expressing the view that he would eventually be able to make some kind of satisfactory arrangements with the co-op and asking Ives to prepare a directors' authorization "to consummate a deal with the co-op". Referring to the purchase of the stock of the Aledo Group, Black told Ives that it would not be possible to do anything by June 1, but that if they would sign a sales agreement giving him sixty days, he felt sure he could get the stockholders $10.00 a share. He was confident that he could secure a market for the stock provided there would be enough shares to "interest a purchaser who would be willing to make an investment substantial enough to warrant his taking some active part in the company." He referred to the arrival "next week" of some friends of Arthur Kincade from New York who were interested in such an investment. Ives was asked to write or wire the number of shares he thought could be acquired in Illinois so that Black would have some idea of what he would be able to offer the prospective purchasers.

Thereafter, and beginning in June of 1944, Ives contacted all of the Aledo Group, appellants here (except those hereafter noted) advising them that the producing properties of the company had been sold for an amount sufficient to return $10.00 per share, and that a deposit of fifty percent of the stock was necessary to evidence good faith; that the undeveloped properties of the company would be retained for development at a later propitious time.

When Ives had acquired fifty percent of the stock holdings of the Aledo Group at $10.00 per share, Black sent the company plane from Great Bend to Illinois and Ives delivered the stock to Black at Great Bend. 25,000 shares of stock were immediately transferred, 10,000 to Edward Roos, 10,000 to Richard Gill, and 5,000 to Arthur Kincade. The proceeds of this sale in the sum of $258,750.00 were transferred to Ives' stock account in Aledo. The remaining 11,714 shares were placed in Black's lock box as street stock. $80,121.64 of Black-Marshall funds were used to pay for this stock. It was first charged to Ives' account on the company books but was later charged to Black's account. The total purchase price was transferred to Ives' stock account in an Aledo bank from which the individual stockholders were paid at the rate of $10.00 per share. Apparently nothing further was said to the Aledo Group concerning the progress of the supposed sale, or for that matter, the progress of the company,

until the following Summer of 1945, when Ives told the Aledo Group that the Black-Marshall Company had now been finally sold and that the stockholders should surrender the remainder of their stock to be paid at the rate of $12.00 per share.

Pursuant to these representations, the remainder of the stock was delivered to Ives and by Ives delivered to Black, who paid for it with Black-Marshall funds by separate vouchers to each of the stockholders. At this point in the course of events Black had in his possession and in his lock box the 11,714 shares of street stock acquired in 1944, the remaining one-half of the stock of the Aledo Group, and also 15,000 shares of Gill and Kincade stock which he had purchased with company funds for $17.50 per share. At about the same time Black negotiated a $3,200,000 loan with the N.C.R.A. under which Black-Marshall agreed to drill twelve producing wells each year for five years for an additional loan of $22,000.00 for each producing well so drilled. The company continued to prosper under the accelerated drilling program.

In preparation for the sale of a majority of the company stock to the N.C.R.A. in 1947, Black retired 56,000 shares of the street stock held in his lock box and thereby balanced his account with the company for the purchase price. With the 11,714 shares of Aledo stock transferred to himself in 1946, he then held in his name or in the name of his family 62,126 shares which he sold to N.C.R.A. for $51.06 a share. In addition, 3,000 shares held by Ives as executor of the Boyd Estate were also transferred to the N.C.R.A. for the same consideration per share. This gave N.C.R.A. a controlling stock interest, and it thereupon proceeded to dissolve the corporation, the other stockholders agreeing to convey their interest in the assets to N.C.R.A. for an amount equal to the $51.06 per share. Under the agreement of sale some of the company assets which the N.C.R.A. did not wish to acquire were sold to Black. The assets of the Landowners Oil Association were transferred to Black for the amount of the accounts receivable due the Black-Marshall Oil Company. From the total consideration of the sale of the stock to the N.C.R.A., Black and his wife received $234,928.74, Black individually $2,814,929.06, and Ives as executor of the Boyd Estate $135,930.00. In addition, an escrow fund of $497,819.21 was created of which Mrs. Black's interest

was $39,123.29, Black's interest amounted to $357,224.50, and the Boyd Estate interest was $17,250.00.

It is suggested that Black purchased the stock upon the insistent demands of the Aledo Group; that he was hard put to find a buyer and this prompted him to use company funds to purchase the stock. It is true that in the Spring of 1944, Ives was being urged to find a market for the stock of some of the distressed investors and that Ives was in turn pressing Black for relief. And, it seems also fair to say that at that time Black was hard put to find a buyer for the stock. But it is also manifestly clear, we think, that sometime in May or June of 1944 Black did find a market, and that market was in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it in the effectuation of that plan. Henceforward Black became anxious to purchase all available stock, and Ives gathered in all of the stock of the Aledo Group and delivered it to Black, according to what we believe to be a well-laid plan. The whole course of events is inconsistent with the idea that Black purchased the stock in response to the sporadic demands of the stockholders.

It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct, that Ives acted as his agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, "although the principal may not have actually authorized the particular fraudulent act, yet he is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment." 2 Am. Jur., Agency § 363; see also Restatement Agency § 261; Anheuser-Busch v. Grovier-Starr Produce Co., 128 F. 2d 146; Cox v. Pabst Brewing Co., 128 F. 2d 468; Siedhoff v. Campbell, 141 Kan. 255, 40 P. 2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, "if those represen-

tations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized." 2 Am. Jur., Agency § 362; see also Restatement Agency, Sections 257, 258.

Moreover, the record shows without much doubt that Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives' representations were brought home to Black.[1] In their brief

[1] Examples of Black's knowledge of Ives' misrepresentations to members of the Aledo Group and consequent ratification are: (a) Between the time the first one-half of appellants' stock was acquired and the acquisition of the second one-half, Black made the same general representations to Sherrard, specifically mentioning that only "producing properties" were being *sold*, and that undeveloped properties of Landowners were being retained "and this property that we weren't selling, we had to keep for a period of two years." (b) In the early Fall of 194[illegible] when Dr. Wadleigh wrote Black inquiring into the details of the transaction, Black asked Ives what should be said. In response Ives wrote Black: "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing." (c) When the Constants inquired of Black on November 21, 1945, Black failed to make a true disclosure, but wrote the Constants that the details were so complicated he would have to talk with them in person when he came to California "over the holidays". Conveniently, Black never looked up the Constants or made any effort to convey the true facts to them regarding the *sale*. (d) All acquired stock was kept in Black's lock box and was subject to his absolute control, yet he failed to take any steps to correct such misrepresentation, at a time when it would have been a simple matter to correct things with the shareholders. Indeed, with such knowledge, he transferred to himself under Certificate No. 398, 11,714 shares of stock which had been held in his lock box as street stock since 1944.

the appellees concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, "he ratifies who does not restore." Maryland Casualty Co. v. Beebe, 54 F. 2d 743, and cases cited. Black kept the stock with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account. The record is barren of any benefits to Ives.

Quite apart from the naked principles of agency, we think there are even stronger reasons for holding Black responsible for the misrepresentations which induced the Aledo Group to part with their stock. The evidence conclusively shows that Black himself stood in a position of trust and confidence to the Aledo Group and he cannot insulate himself from the fraud by denying Ives' agency. From the very beginning the Aledo investors entrusted their funds to Black with unlimited powers of management. When the Group was incorporated for the continuation of their joint venture, Black became the president, chairman of the board and chairman of the executive committee. True, some of the Aledo Group were made directors of the company, but they took no part in the management of its affairs. For all practical purposes Black was the corporation; he did with it as he saw fit, and the stockholders followed him with almost blind loyalty, as evidenced by the facility by which Ives was enabled to obtain almost fifty percent of their stock in 1944 and the remainder in 1945. Ives was, in the last analysis only the conduit through which Black dealt with the Aledo Group. Having established this confidential relationship, he owed them the duty at least to be truthful with respect to all corporate transactions. Whether we apply the Kansas strict accountability rule, see Blazer v. Black, 10 Cir., 196 F. 2d 139, or the less stringent rule applicable in Illinois, see Agatucci v. Corradi (Ill.), 63 N.E. 2d 630; Dunnett v. Arn, 10 Cir., 71 F. 2d 912, equity will not condone fraudulent representations under which one standing in a confidential relationship is enabled to take advantage of another. See Auer v. Wm. Meyer Co., et al., 322 Ill. App. 244, 54 N.E. 2d 394. In these circumstances, equity prescribes a standard of rectitude quite above the ethics of the bargaining counter. 54 Am. Jur., Trusts, Sections 220, 225 and 226; Securities and Exchange Commission v. Chenery, 318 U.S. 80; Manufacturers Trust Co. v.

Becker, 338 U.S. 304. It will intervene to declare the wrongdoer a trustee and hold him accountable for the fruits of his inequitable conduct. Falk v. Hoffman (New York), 135 N.E. 243. In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945. Dunnett v. Arn, supra, at Page 920; Blazer v. Black, supra.

Appellees say that in any event the value of the stock of the company in 1944 and 1945 was not more than that which the Aledo Group received, and having received the full value of their stock they could have no complaint. The trial court so found and so held. But the value of the stock at the time it was fraudulently obtained is not the measure of relief in equity. Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages. Dunnett v. Arn, supra, Blazer v. Black, supra; Falk v. Hoffman, supra. In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it.

Reverting now to those parties to the suits who were beneficially excluded from the trial court's affirmative findings of misrepresentation on the part of Ives, we must consider each claim upon its own factual footing and of course accord due weight to the negative findings of the trial court with respect to those particular parties. Hokin, Jones, Bowers, Nelson, Elving and Ogle did not appeal from the adverse judgment and their claims are not before us. With respect to the parties falling within this category who have appealed and who may be classified as members of the Aledo Group, we ought to consider the correctness of the findings and conclusions of the trial court against the factual background of Ives' established relationship to the Group. It is important to keep in mind the fact that to most of the appellants he was a personal friend, attorney and confidant. And it was through this relationship that the Aledo Group was induced to purchase stock, first in the Petroleum Investment Company and later in the Black-Marshall Company; and it was through this same confidential medium that he was enabled

to marshall one-half of the stock in 1944 and the other half in 1945, in consummation of what we hold to be Black's scheme to defraud. We have the oral and written word of Ives that he made the same representations to all of the Aledo Group of investors whom he contacted in the effectuation of the scheme. Indeed, the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance.

Ives had no direct contact with either Amen or Baldwin. Amen lived in Yankton, South Dakota. Baldwin lived in Rock Island, Illinois. All of their transactions with Black-Marshall were through Dr. Danford, a prominent member of the Aledo Group and a large stockholder. It was through Dr. Danford that both Amen and Baldwin were induced to purchase stock. Baldwin left his stock in Danford's lock box. Ives was an old and trusted friend of Danford, and when in June of 1944 Ives set out to acquire one-half of the stock of the Aledo Group he immediately contacted Danford and by false and fraudulent representations induced him to part with one-half of his stock. At the same time he induced Danford to procure Amen's and Baldwin's stock. Pursuant to these directions and representations, Danford did secure their stock along with his own. Whether Danford acted as Ives' agent or as agent for Baldwin and Amen, they undoubtedly relied upon Ives' false representations to Danford, and as we have said, Black is liable for the misrepresentations of his agent, Ives, to Danford. See Restatement, Agency § 315.

Testifying in her own behalf, Edith Hall told substantially the same story as other appellants whose testimony was credited in the court's affirmative findings of misrepresentations. It is true that her memory failed her on cross examination, but we have Ives' word that he made the same representations to her as to other members of the Aledo Group whose testimony has been credited in accordance with the established pattern of proof. We think there can be no valid exception to Mrs. Hall's claim when considered in the context of the whole record.

McBride did not testify in his own behalf and the only proof of actionable misrepresentation is Ives' general statement to the effect that he made the same representations to all of the Aledo Group, including McBride. In the absence of any direct proof of fraudulent misrepresentations

or reliance upon the general pattern, we will not overturn the trial court's findings in that regard.

We hold, therefore, that appellants Amen, Baldwin and Hall are entitled to participate in the proceeds of the sale of the company in proportion to their equitable stock holdings at the time of the sale along with the other appellants as to whom the trial court found Ives made misrepresentations, and as to whom we have said Black was liable as responsible principal and unfaithful trustee.

This brings us to the corporate claims, and more particularly to the right of Black to participate in the proceeds of the sale to the N.C.R.A. on the basis of the 32,457.50 shares of stock which the appellants contend should be denied participation because fraudulently issued to Black as a promoter's illegal secret profit.

Inasmuch as the appellants do not seek to set aside the 1947 sale of stock to the N.C.R.A. by Black, but rather to impress a trust upon the proceeds of the sale, and constitute Black as trustee therefor, they ceased to be either legal or equitable stockholders upon the consummation of the sale, and consequently have no capacity to maintain a derivative action on behalf of the corporation for the redress of corporate wrongs. This is true, even though the wrongs complained of were committed while they were either legal or equitable stockholders. Hanna v. Lyon, 71 N.E. 778; 3 Fletcher, Cyclopedia of Corporations, Sec. 1286, page 988.

And while the corporate receivers may have capacity to maintain the suit on behalf of the dissolved corporation because of the invulnerability of the order of the Illinois Federal Court setting aside the corporate dissolution; 16 Fletcher, Cyclopedia of Corporations, Sec. 7764, page 223; 19 C.J.S., Corporations, Sec. 1693, pp. 1460-1; Town of Vandalia et al v. St. Louis, V. & T.H.R. Co. et al (Ill.), 70 N.E. 662; Blanchard Bro. & Lane v. S. G. Gay Co. et al (Ill.), 124 N.E. 616; Miller v. Union State Inv. Co. et al (Ill.), 61 N.E. 2d 764; Badger v. Hoidale (8th Cir.), 88 F. 2d 208; yet equity, looking at the substance of the proceedings, will make sure that the beneficiaries of the corporate redress are equitably entitled to the fruits of its processes. In the language of Judge Pound in Home Fire Ins. Co. v. Barber, et al (Nebr.), 93 N.W. 1024, 1033: ". . . When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceedings, and, if the beneficiaries of the judgment

sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result."

Looking at the substance of the corporate claims and the beneficiaries thereof, it becomes readily apparent that the principal beneficiary of any recovery on behalf of the corporation would be the N.C.R.A. who became the principal stockholder upon the purchase of a majority of the stock in 1947. And having purchased the stock of the corporation from Black in an arms length transaction, and having received the full value of its purchase, any recovery as stockholder beneficiary of the dissolved corporation would be tantamount to recoupment of the legitimate purchase price of the stock. Obviously there are no equities in such a result, and we therefore hold that the corporate claims must fail for lack of standing to maintain the suit and for want of equity on the part of the beneficiaries in any corporate recovery. And see Home Fire Ins. Co. v. Barber, supra.

But the failure of the corporate claims in nowise militates against the standing of the former stockholders entitled to participate in the proceeds of the sale from contesting the right of Black or anyone else to participate in the fund which equity has created by raising a trust and constituting Black as trustee therefor ex malificio. The appellants, former stockholders, seek to set aside the issuance of 32,457.50 shares of stock to Black on the grounds that they were fraudulently issued to him, and thus recover the proceeds of the sale of that stock for themselves and those equitably entitled to participate therein. They sought relief through the medium of the corporation. But looking at the real parties in interest to the fund, equity will recognize the standing of the beneficiaries to contest the rights of others also claiming an interest by virtue of stock ownership at the time of the 1947 sale. The court has jurisdiction of the proceeds of the sale; it has jurisdiction of the parties; and Black is being required to account to the defrauded stockholders as equitable owners of the stock he sold to the N.C.R.A., as an incident to equitable accounting and the achievement of complete justice. The court may assuredly determine the rightful ownership of all the stock entitled to participate in the proceeds of the 1947 sale, and in so doing, it will not be restrained by mere forms of action or niceties of plead-

ings. See 30 C.J.S., Equity, Sections 67 and 68, pp. 414-421; 19 Am. Jur., Equity, § 127, page 126.

The facts leading up to the organization of the corporation in January of 1940 and the issuance of the stock are reasonably clear to the effect that sometime in the early Fall of 1939, Black discussed with Ives his plan to organize a corporation so that they could operate "as a company instead of as an individual". In November of 1939, Black proposed to the board of directors of Landowners Association to take 4,000 shares of preferred and 40,000 shares of common stock of the proposed corporation in full payment of the properties held by Black and "his associates" to be transferred to the corporation, including the five Barton County, Kansas oil and gas leases. When the corporation was organized by Ives in Aledo in January, 1940, these five Barton County, Kansas oil and gas leases were formally transferred to the corporation. The properties of Landowners were also transferred in consideration of 20,000 shares of common and 2,000 shares of preferred stock of the newly formed corporation. The number one stock certificates for 10,000 shares of common stock and 1,000 shares of preferred stock were issued to Black. Certificates numbered two for like amounts were issued to Marshall; certificates numbered three for like amounts were issued to Boyd; and certificates numbered four for like amounts were issued to Ives. At the same time the Aledo Group were issued preferred and common stock on the basis of one share of common stock for each $2.00 invested with Black prior to the formation of Black-Marshall and one share of preferred stock for each $4.00 so invested. These certificates were signed by Black as president and Ives as secretary. Certificates numbered 5 to 14, inclusive, in the total amount of 64,870 shares of common stock were issued to "W. H. Black et al" and signed by Black but not by secretary Ives. Revenue stamps were affixed and cancelled. When one of the former stockholders in the Landowners Group discovered that this large block of stock had been issued to "Black et al", he complained of the issuance of the stock as a violation of the preorganization agreement fixing the ratio of the stock ownership in the new company based upon the respective properties transferred. Sometime thereafter these stock certificates (5 to 14, inclusive) were repasted into the stock book. No one came forward to say who issued the certificates, under what circumstances, or who re-

pasted them in the stock book. The stubs were not in secretary Ives' handwriting. Black testified that upon the formation of the corporation he signed all of the stock certificates in blank and could not explain how they happened to be issued to him. He denied that they had been validly issued to him, or for that matter that they had been validly issued at all.

The minutes of the first annual stockholders meeting held at Aledo, Illinois, January 17, 1941 over which Black presided, showed that he owned 11,000 shares of the corporation stock (1,000 shares of preferred and 10,000 shares of common). Apparently, however, immediately after that meeting the "Black et al" stock was reissued as certificates numbered 155 to 166, inclusive. Each certificate, signed by Black as president and Ives as secretary, contained a notation "correction of name only". When Black was pressed for an explanation concerning the circumstances under which the 64,870 shares of stock were reissued to him, he simply stated, "I don't propose to explain it, because I can't explain it, sir."

Black now contends that the 64,870 shares of stock were issued to him and Marshall in consideration of the transfer of the five Barton County oil and gas leases which they had acquired and partially developed as a partnership, independent of the Aledo investors. But the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common and 4,000 shares of preferred stock and that this same amount of stock was represented by the first four certificates issued to Black, Marshall, Boyd and Ives. They thereby received the full consideration for the five leases in accordance with the preorganization agreement. There is no evidence whatever that Black contributed anything else to the corporation for which he and Marshall would be entitled to receive 64,870 shares of stock. We do not understand anyone to so contend. Moreover, the evidence shows without dispute that beginning in the early fall of 1939, the Aledo Group transmitted funds to Black through Ives and that these funds were used for the acquisition and development of the five leases. It is true that the Esfeld lease was acquired in July and a well drilled thereon during which time Black did not receive any funds directly from the Aledo Group. And Black undoubtedly used outside funds with which to acquire the lease and drill a well thereon. But the rec-

ord is also clear that Black acknowledged the Aledo Group's interest in all of these leases. On December 7, 1949 he made a detailed report to Ives of monies received and spent in the acquisition and development of these valuable leases. The report showed that as of that date the Aledo Group had contributed $17,650.00 of a total of $28,415.00 expended. $8,000.00 ($3,000.00 for the Krier lease and $5,000.00 on a drilling contract) was due and unpaid and apparently was assumed by the corporation upon its organization in January, 1940. Other sums were contributed by the Aledo Group between December 7, 1939 and the date of organization of the corporation; and in answer to interrogatories, Black acknowledged receipt of approximately $30,000.00 from the Aledo Group, all of which was used in the acquisition and development of these five leases.

From these facts it is clear that each party received stock consideration for his investment in accordance with the preorganization agreement. The Landowners Association received their stock; Black, Marshall, Boyd and Ives received their stock for their interests in the Barton County leases; the Aledo Group received stock for their investment; and the 64,870 shares, of which 32,457.50 were issued to Black and sold to N.C.R.A., could be nothing but purely promotional stock. And it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black.

Nor do we believe that the asserted claims are barred by the Kansas statute of limitations or analogous laches. Under the Kansas statute, an action for relief on the grounds of fraud may be brought at any time within two years after accrual; and it does not accrue until the discovery of the fraud (Sec. 60-306, Kan. Gen. St., 1949) meaning the "discovery of such facts as would on reasonable diligent investigation, lead to knowledge of the fraud." Sauberli v. Sledd (Kan. 1936), 55 P. 2d 415, 419, and cases cited; Dalton v. Hill (Kan. 1950), 219 P. 2d 710, 716; Lewis v. Duncan (Kan. 1903), 71 Pac. 577. And while this suit is in equity invoking equitable remedies, the statute of limitations governing relief on the grounds of fraud is applicable rather than laches, notwithstanding what we said in Blazer v. Black, 196 F. 2d 139, 147. See Dalton v. Lawrence Nat. Bank (Kan. 1950), 219 P. 2d 719; Guilfoyle v. Brown (Kan. 1939), 88 P. 2d 1082; Hughes v. Reed (10 Cir.), 46 F. 2d 435; Curtis v. Connly, 257 U.S.

260, 66 L. Ed. 222, 42 S. Ct. 100; Anno., 174 A.L.R. 1217, 1226, Sec. 5; 34 Am. Jur., Lim. of Actions, § 59, page 55.

The record is conclusive that the appealing shareholders did not personally have knowledge of the perpetrated fraud and equally convincing that the individual appellants cannot be charged with having failed to use due diligence to discover such fraud. In determining whether reasonable diligence was exercised for the purpose of discovering fraud, one of the most important determinants is the relationship of the parties. As we have seen, the record conclusively establishes a fiducial relationship between Black and the appellants as former stockholders. And the law does not require one to suspect his fiduciary. Surely no one would contend that the Kansas statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust and confidence. Indeed, some courts excuse the failure to use diligence in the face of a relationship of trust and confidence rendering it the duty of the party committing the fraud to disclose the truth to the other. Auer v. Wm. Meyer Co. (Ill. 1944), 54 N.E. 2d 394. Cf. Michelsen v. Penney (2d Cir.), 135 F. 2d 409. In the language of the Kansas court, "A party, even though his suspicions have been aroused, may well be lulled into confidence, and take no action by such representations as were made." Dalton v. Hill, 219 P. 2d 710, 716. And, "Only where a party defrauded would plainly have discovered the fraud except for his own inexcusable inattention, will he be charged with a discovery in advance of actual knowledge on his part." Connell v. Saco Oil Co., 223 P. 2d 1020, 1027. See also Dalton v. Lawrence Nat. Bank, supra.

The successful appealing shareholders are entitled to money judgments against Black equal to the values of their equitable stock holdings in Black-Marshall sold to N.C.R.A. in 1947, less sums already received for such interests.

To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence, the following formula: First, inquiry must be made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N.C.R.A. for the Black-Marshall assets by the number of such validly issued shares.

Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amounts paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transactions and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them.

The judgment of the trial court is REVERSED and the causes REMANDED with directions to proceed in accordance with the views herein expressed.

PHILLIPS, *Circuit Judge*, dissenting in part:

Plaintiffs below have appealed from a single judgment adverse to them, entered in three cases, which had been consolidated for trial.

On June 28, 1949, Amen commenced an action in the United States District Court for the District of Kansas, numbered 3495 on the docket of such court, against William H. Black and Dale G. Ives. There were other defendants whose presence as parties is no longer material.

The action was brought as a class action for the benefit of Amen and all other stockholders of the Black-Marshall Oil Company, an Illinois corporation, hereinafter called the B-M Company, similarly situated. Certain former stockholders in the B-M Company intervened. In an amended complaint it was alleged that Black and Ives entered into a conspiracy to acquire the stock and assets of the B-M Company for Black's own use and benefit; that Black and Ives falsely represented to the plaintiffs that a sale of a large portion of the assets of the B-M Company had been arranged for an amount equal to $11 per share; that certain undeveloped oil and gas leases of the B-M Company would not be included in the sale, but would be retained for the benefit of the stockholders of the B-M Company; that induced by such false representations the plaintiffs, in 1944 and 1945, endorsed in blank and delivered to Black and Ives stock certificates representing their respective shares in the B-M Company and received therefor $11 per share; that Black and Ives effected a sale of the

stock and assets of the B-M Company to the National Cooperative Refinery Association, hereinafter referred to as the Cooperative Association, at a price, which, when prorated among the shareholders of the B-M Company, excluding the plaintiffs, resulted in a distributive portion per share substantially in excess of the price paid by Black and Marshall to the plaintiffs for their shares. The plaintiffs did not learn of such fraudulent conspiracy and acts until May, 1949. The plaintiffs prayed for the recovery of their proper and lawful distributive shares of the purchase price paid by the Cooperative Association for stock in the B-M Company.

It was further alleged in the amended complaint that Black caused to be issued to himself for his benefit, at the time of the original issue of the stock of the B-M Company, shares of stock for which Black gave no consideration, and that Black withdrew large sums of money from the treasury of the B-M Company for his own use and benefit and employed B-M Company funds to finance his personal business ventures. For the alleged wrongs to the corporation, Amen and the interveners prayed for relief on behalf of the corporation.

On September 25, 1950, Walker and Windish, co-receivers of the B-M Company, filed a complaint in intervention in No. 3495 in which they alleged that Black, at the time of the original issue of stock in the B-M Company, caused to be issued and transferred to him shares in the B-M Company for which he paid no consideration, and that Black withdrew large sums of money from the treasury of the B-M Company for purposes other than proper corporate purposes and for his own use and benefit and to finance his personal business ventures for his personal profit. The co-receivers prayed for relief on behalf of the corporation.

On July 14, 1950, the co-receivers filed an action in the United States District Court for the District of Kansas, numbered W-143 on the docket of such court, against William H. Black in which they alleged substantially the same facts as they had alleged in the intervening petition in No. 3495, and sought redress from the defendant on account of the stock alleged to have been issued to Black without consideration and the use of funds of the B-M Company by Black for his personal benefit.

Prior to July 15, 1949, Amen, Wadleigh, Danford, Robinson, Hall and Riley commenced an action in the District

Court of McPherson County, Kansas, against William H. Black and other defendants, whose presence as parties is no longer material. The action was brought for the benefit of the plaintiffs and all other stockholders of the B-M Company similarly situated. On the date last mentioned, such action was removed by the defendant to the United States District Court for the District of Kansas, where it was numbered 3509 on the docket of that court. On July 25, 1950, an amended complaint was filed in No. 3509, which alleged essentially the same facts as those alleged in the amended complaint in No. 3495.

Thus, it will be seen that in No. 3495 and No. 3509 certain former stockholders in the B-M Company, either as parties plaintiff or as interveners, sought relief in their individual behalf from William H. Black on account of the alleged fraudulent representations that a sale of the assets of the B-M Company had been effected, whereby they were induced to deliver their stock endorsed in blank to William H. Black, who subsequently sold such stock to the Cooperative Association at a much larger price per share. They, in effect, affirmed the sale of their stock to Black and prayed that Black be required to account for the moneys he received from the sale of the stock of plaintiffs and interveners to the Cooperative Association. It will be further observed that the plaintiffs and interveners in No. 3495 and No. 3509 undertook to join with their original action a stockholders' derivative action in which they sought to recover on behalf of the B-M Company for the injuries to the B-M Company alleged to have resulted from the issue of stock to Black without consideration and the alleged use by Black of the corporate funds for his personal benefit.

At the close of plaintiffs' evidence in the trial below, the co-receivers who had intervened in No. 3495 elected to stand upon their action No. W-143 for redress of the alleged wrongs to the B-M Company.

Many of the individual plaintiffs and interveners in No. 3495 and No. 3509 resided in, or in the vicinity of Aledo, Illinois, and may be referred to as the Aledo Group.

Involved in the consolidated actions were four claims:

1. The claim of the Aledo Group against William H. Black predicated on the alleged false representations of Black, acting through his agent, Ives, to recover the amount that Black received from the sale of the stock of the Aledo Group to the Cooperative Association in excess of

the $10 and $12 per share, respectively, which the Aledo Group received from their stock;

2. The claim in the nature of a derivative action by the original stockholders and an original action by the co-receivers to recover on behalf of the corporation on account of 32,457.5 shares of stock alleged to have been issued to Black without consideration and sold by him in 1947 to the Cooperative Association for $51.06 a share;

3. A claim asserted by the co-receivers for recovery of profits alleged to have been realized by Black from the use of B-M Company funds in personal business ventures; and

4. The claim of the co-receivers for profits realized by William H. Black for transactions in which B-M Company funds were used for Black's personal profit.

That Ives made the alleged false representations with respect to the sale of the assets of the B-M Company to members of the Aledo Group is conceded. The trial court found that such representations were made by Ives without solicitation by William H. Black and without the knowledge of William H. Black. However, Black testified that he told the Aledo Group that Ives was his agent in all matters with respect to the B-M Company, and especially for the purpose of furnishing information to the Aledo Group. Therefore, it is my opinion that Black was estopped to deny Ives' agency and that Ives had apparent or ostensible authority to furnish information on Black's behalf to the Aledo Group with respect to the B-M Company and that the representations made by Ives to the Aledo Group were within the scope of the apparent or ostensible authority of Ives and Black was bound thereby.[1]

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[1] Faber-Musser Co. v. William E. Dee Clay Mfg. Co., 291 Ill. 240, 126 N.E. 186;

2 CJS, Agency, § 96, pp. 1205-1220;

See also:

Anheuser-Busch v. Grovier-Starr Produce Co., 10 Cir., 128 F. 2d 146;

Greep v. Burns, 160 Kan. 48, 158 P. 2d 803;

Siedhoff v. Campbell, 141 Kan. 255, 40 P. 2d 404;

Nelson Development Co. v. Ohio Oil Co., 45 F. Supp. 933;

Spann v. Commercial Standard Ins. Co. of Dallas, Texas, 8 Cir., 82 F. 2d 593;

Metropolitan Life Ins. Co. v. Henderson, 9 Cir., 92 F. 2d 891;

On that ground and that ground alone, I concur in the majority opinion, insofar as it reversed the judgment below, with respect to the claim of the Aledo Group to recover from William H. Black for the injuries suffered by the Aledo Group on account of the alleged false and fraudulent representations of Ives.

The majority opinion affirms the judgment below, with respect to the third and fourth claims. It also affirms the judgment below, with respect to the derivative stockholders' action (Claim Two) and the claims asserted by the co-receivers in cause No. W-143. However, on a theory which, in my opinion, has neither basis in law nor justification in equity, the majority opinion holds that the Aledo Group may obtain redress against William H. Black for the wrong alleged to have resulted to the corporation from the issuance to William H. Black of the 32,457.5 shares of stock.

The Petroleum Investment Company was a partnership or a joint venture, formed in 1938. Its members were Black, Ives and the members of the Aledo Group. From $21,000 invested in the venture by members of the Aledo Group, nine dry holes were drilled in Illinois and Indiana. That unsuccessful venture was completed in early 1939. Thereafter, in the spring of 1939, William H. Black and D. J. Marshall formed a partnership, which thereafter acquired five oil and gas leases in Kansas. That partnership drilled a well on a lease known as the Esfeld lease, which came in as a producer in July, 1939, and established such lease as one of the most valuable leases in the State of Kansas. The funds for acquiring the lease and drilling and equipping such well were furnished by Black and Marshall, with the exception of $9,000, which Black borrowed on his own credit and which was ultimately assumed by the B-M Company.

Up to August 23, 1939, the Aledo Group made no advancements of funds to the Black-Marshall partnership. After the Esfeld lease had been developed as a commercial producer and from August 23, 1939, to December 7, 1939, the Aledo Group advanced to the partnership $17,650 and Black advanced $28,415. Subsequent to the latter date, the Aledo Group advanced additional funds, both before and

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Ferro Concrete Const. Co. v. United States, 1 Cir., 112 F. 2d 488, certiorari denied 311 U.S. 697, 61 S. Ct. 136, 85 L. Ed. 452; Roth v. Hyer, 5 Cir., 133 F. 2d certiorari denied 318 U.S. 782, 63 S. Ct. 859, 87 L. Ed. 1149.

after the incorporation of the B-M Company, to carry on the development of the Kansas leases.

The first meeting of the incorporators of the B-M Company was held in Aledo, Illinois on January 11, 1940. The minutes of that meeting recite that the chairman presented a subscription agreement bearing subscriptions for 122,500 shares of common stock and 9,055 shares of preferred stock of the B-M Company and that a resolution was unanimously passed accepting such subscriptions on behalf of the corporation. At the same meeting a proposal was presented from the Landowners Oil Association, owned by a Chicago, Illinois group, to exchange at least 75 per cent of the outstanding stock of Landowners for 20,000 shares of common stock and 2,000 shares of preferred stock of the B-M Company and that a resolution was adopted approving such proposal.

The five Kansas leases were assigned to the B-M Company in exchange for the entire subscription of 122,500 shares of common stock and 9,055 shares of preferred stock. Undoubtedly, it was originally contemplated that 10,000 shares of common stock and 1,000 shares of preferred stock would be issued to Black and 10,000 shares of common stock and 1,000 shares of preferred stock would be issued to Marshall, but it developed that Black and Marshall were unwilling to assign the leases to the B-M Company, unless they received, in addition to the 20,000 shares of common stock and 2,000 shares of preferred stock, 64,870 shares of common stock.

Black signed the stock certificates in blank. The certificates for 64,870 shares made out to Black, et al. (The omission of Marshall's name was for reasons personal to Marshall) were not signed by Ives and not actually delivered to Black and thereafter Ives reissued such stock to Black and Marshall at about the time of the stockholders' meeting January 1, 1941, to enable Black to transfer to members of the Aledo Group a portion of such shares, which they had purchased from Black. While Black admitted he could not explain why Ives failed to sign the original certificates made out to Black, et al., his testimony made it very clear that Black and Marshall were unwilling to assign the Kansas leases for 20,000 shares of common stock and 2,000 shares of preferred stock.

Common stock was issued to the investors in the Petroleum Investment Company on the basis of one share of common for each $2.00 invested, and one share of preferred for each $4.00 invested, both in the Illinois venture and by

advancements to the Black-Marshall partnership in Kansas.

Certainly, Marshall was under no obligation, legal or moral, to bail the Aledo Group out from their non-profitable venture in Illinois. No wrongdoing by Black with respect to the Illinois venture was claimed, and it follows that Black was under no legal or moral duty to aid the Aledo Group in recouping their losses in the Illinois venture. Under all the facts and circumstances, it is a reasonable inference that Black and Marshall would be unwilling to assign the Kansas leases in exchange for 20,000 shares of common stock and 2,000 shares of preferred stock.

The original five directors of B-M Company were Black, Marshall and three members of the Aledo Group; Ives, Boyd and Stevenson. At the second annual meeting of the stockholders of the B-M Company, held in January, 1941, Black and Marshall and five members of the Aledo Group; Ives, Stevenson, Berglund, L. E. Robinson and Sherrard were elected as directors of the B-M Company. At the annual meeting of the directors, held on January 7, 1941, an audit report covering the first fiscal year, ending July 31, 1940, was examined and approved. Such audit report showed that on January 20, 1940, the Board of Directors authorized the issuance of 122,500 shares of common stock, including the 64,870 shares of stock issued to Black and Marshall in exchange for five leases and the assumption by the corporation of liability existing against the said leases in the amount of $8,827.93. At the next annual meeting of the board of directors, held in 1942, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo Goup and Allen James of the Landowners Corporation, an audit report for the period ending July 31, 1941, was examined and approved. That audit report also showed the issuance of the above-mentioned shares. At the next annual meeting of the board of directors, held in January, 1943, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo Goup and Ranney of the Landowners Corporation, an audit report for the year ending July 31, 1942, was examined and approved. The report also showed the issuance of the above-mentioned stock. Like audit reports covering subsequent years were presented, examined and approved at stockholders' meetings, held in January and December, 1944.

The minutes of the annual meeting of the stockholders

of the B-M Company, held on January 20, 1942, which were read and approved at the annual stockholders' meeting in 1943, showed Black as the owner of 70,000 shares of B-M Company common stock. The same is true with respect to the minutes of the stockholders' meeting held on January 27, 1943, which were read and approved at the stockholders' meeting in January, 1944.

At the annual meeting of the stockholders, held on December 6, 1944, the stockholders adopted a resolution authorizing the purchase from Marshall of 38,978.75 shares held by him and on the same day the board of directors adopted a like resolution and a written contract was entered into for the purchase of such shares from Marshall.

Finally, many of the audit reports referred to above were furnished to a number of persons who were members of the Aledo Group.

The trial court found that Black and Marshall were issued 20,000 shares of common stock, 2,000 shares of preferred stock, and an additional 64,870 shares of common stock in exchange for the Kansas leases and that the corporate records reflected these facts.

That the corporate records reflected such facts was established by uncontroverted written evidence. That such stock was issued to Black and Marshall in exchange for an assignment of the Kansas leases was unequivocally testified to by Black.

Since the trial judge has the opportunity of observing a witness while testifying and his demeanor on the witness stand, ordinarily the questions of the credibility of the witness and the weight to be given his testimony are peculiarly questions for determination by the trial court.[2]

Under Rule 52(a) of the Federal Rules of Civil Procedure, an appellate court may not set aside findings of fact by a trial court, unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of witnesses. When there is evidence to support a finding, the reviewing court may not set it aside as clearly erroneous, unless, on a consideration of the

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[2] Zimmer v. Acheson, 10 Cir., 191 F. 2d 209, 212;
Brown v. American National Bank, 10 Cir., 197 F. 2d 911, 914.

entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed.[3]

Under the existing facts and circumstances, it would have been strange, indeed, if Black and Marshall would have been willing to have transferred to the B-M Company the Esfeld lease, the large value of which already had been established by development, and the other four leases, which gave much promise, for 20,000 shares of common stock and 2,000 shares of preferred stock in the B-M Company.

I think it may not be said that this court, on a consideration of the entire evidence, is left with the definite and firm conviction that the finding of the trial court, last above adverted to, was clearly erroneous.

I will now assume, without conceding, that the 32,457.5 shares, one-half of the 64,870 shares issued to Black and Marshall, were issued to Black without consideration. If that occurred, the wrong was a wrong to the B-M Company, the corporation, and not a wrong to its stockholders, although they might suffer indirectly because thereof. It gave rise to a claim which only the corporation could assert, or the stockholders in a proper case as a derivative action. In legal effect a derivative action by a stockholder or stockholders is one conducted by a stockholder or stockholders as the corporation's representative.[4]

The stockholder is only a nominal plaintiff. The corporation is the real party in interest.[5]

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[3] United States v. United States Gypsum Co., 333 U.S. 364, 395;

H. F. Wilcox Oil & Gas Co. v. Diffie, 10 Cir., 186 F. 2d 683, 696.

[4] Eriksson v. Boyum, 150 Minn. 192, 184 N.W. 961, 963;
Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513, 516.
Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5939.

[5] Thomson v. Mortgage Inv. Co., 99 Cal. App. 205, 278 P. 468, 471;

Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39;

Hayden v. Perfection Cooler Co., 227 Mass. 589, 116 N.E. 871, 872;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5939.

Where the plaintiff does not seek to enforce relief for the benefit of the corporation, it is not derivative.[6]

Unless otherwise provided by statute, a stockholders' derivative action is always one in equity.[7]

In a derivative action the stockholder stands in the corporation's shoes and must base his action on the corporation's rights and a wrong to it.[8]

A stockholder cannot sue unless there is, at the time he brings the suit, a cause of action which could be instituted by the corporation if it so desired.[9]

The relief granted will be exactly the same as the corporation might have had if it had been plaintiff.[10]

Any recovery belongs to the corporation. Direct relief to the stockholders cannot properly be granted.[11]

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[6] Spear v. H. V. Greene Co., 246 Mass. 259, 140 N.E. 795, 798;

Moore v. Las Lugas Gold Mines, 172 Wash. 570, 21 P. 2d 252, 263;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, Sections 5939, 5908.

[7] Moore v. Las Lugas Gold Mines, 172 Wash. 570, 21 P. 2d 253, 263;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5944.

[8] Lawrence v. Southern Pac. Co., 180 F. 822, 825;

Turner v. Markham, 155 Cal. 562, 102 P. 272, 275;

Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. 2d 976, 980;

Walters v. Horace Waters & Co., 201 N.Y. 184, 94 N.E. 602, 604;

Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5947.

[9] Kessler v. Ensley Co., 123 F. 546, 550, c.d. 205 U.S. 541;

Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39;

Seitz v. Michel, 148 Minn. 80, 181 N.W. 102, 105;

Cochran v. Shetler, 286 Pa. 226, 133 A. 232, 234;

Outing v. Plum, 212 Iowa 1169, 235 N.W. 559, 560;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5947.

[10] Collins v. Penn-Wyoming Copper Co., 203 F. 726, 729;

Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513, 516;

Reid v. Robinson, 64 Cal. App. 46, 220 P. 676, 680;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 6027.

[11] Jacobs v. First Nat. Bank of Shreveport, 35 F. 2d 227, c.d. 284 U.S. 634;

Joyce v. Congdon, 114 Wash. 239, 195 P. 29, 30;

Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. 2d 976, 980;

Any defense, affirmative, or for want of facts, that would be good if the corporation itself was plaintiff is also good in a stockholders' derivative action.[12]

A judgment against the corporation in an action brought by it involving the same subject matter ordinarily is a defense to a derivative action.[13]

The majority holds that the Aledo Group could not maintain the derivative action and that the co-receivers could not maintain a direct action for the benefit of the corporation on account of the alleged issue to Black of the 32,457.5 shares of stock for reasons set forth in the majority opinion.

The action by the co-receivers, cause No. W-143, was commenced more than six years after the directors and certainly many of the stockholders had full knowledge of the fact that 64,870 shares of stock in the B-M Company had been issued to Black and Marshall, purportedly in exchange for transfer of the Kansas leases.

Section 60-306, G.S. Kan. Anno. 1949, in part provides:

> "*Third.* Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

Even if it can be said to be an action for fraud, the suit must have been commenced within two years after the discovery of such facts as could on reasonably diligent inquiry or investigation lead to the knowledge of the fraud.[14]

Harris v. Pearsall, 116 Misc. Rep. 366, 190 N.Y.S. 61, 75; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 6028.

[12] Kessler v. Ensley Land Co., 148 F. 1019, 1020, c.d. 205 U.S. 541;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5859.

[13] Hawkins v. Glenn, 131 U.S. 319, 329.

[14] See City of Coffeyville v. Metcalf, 134 Kan. 361, 5 P. 2d 807, 810;

Woodworth v. Kendall, 172 Kan. 332, 239 P. 2d 924, 926.

It seems clear to me that the corporate action was barred by the Kansas statute of limitations. Likewise, it is clear that on June 28, 1949, when the derivative action was commenced, an action brought by the corporation would likewise have been barred by the Kansas statute of limitations.

Under facts clearly established in the evidence, it certainly is beyond the realm of possibility that the Aledo Group, as stockholders, and a portion of them as directors, did not know, at least more than four years from the time the first of the actions was commenced, all of the facts with respect to the issuance of the 64,870 shares of stock to Black and Marshall.

Applying the statute of limitations by analogy, the derivative action was clearly barred by laches.

If the 32,457.5 shares of stock were wrongfully issued to Black, a like amount of the stock was wrongfully issued to Marshall, yet the Aledo Group, in 1944, not only knew of the issuance of such stock to Marshall, but they joined as stockholders and a portion of them as directors in the adoption of resolutions which ultimately resulted in the purchase of such stock from Marshall, thus acquiescing in the original issue of stock to Black and Marshall.

The majority, conceding that neither the corporate action nor the derivative action may be maintained, hold that certain persons who compose only a portion of the stockholders at the time of the alleged wrongful issue of such stock to Black, but who are no longer stockholders in the corporation, may recover the indirect or consequential damages suffered by them on account of the wrongful issue of such stock. They thus permit recovery by a limited group of former stockholders for a wrong done to the corporation, which resulted not only in indirect injury to such former stockholders, but to other stockholders, such as the Landowners Association and their successors.

If the 32,457.5 shares of stock issued to Black were, in fact, issued without consideration in 1940, the wrong was a primary wrong to the corporation, which resulted in indirect injury to all of the stockholders of the B-M Company at that time.

Since the wrong complained of was a wrong to the corporation, resulting in immediate and direct injury to it and only indirect or consequential damage to all of

the stockholders, a stockholder or stockholders could not maintain an individual action to recover damages for such wrong.[15]

A stockholder cannot maintain an action in his own name and in his own behalf to recover loss resulting from depreciation of the value of his stock caused by an injury to the corporation itself.[16]

It is only when the injury to the shares of the stockholder is peculiar to him alone and does not fall alike upon other stockholders that he can recover as an individual.[17]

The theory upon which such relief is given by the majority opinion to the Aledo Group is contrary to the theory of recovery for such alleged wrong set forth in the pleadings and to the theory upon which the case was presented, both in the trial court and in this court.

For the reasons indicated, I respectfully dissent from that portion of the opinion which directs the granting of relief to the Aledo Group, because of the issuance of the 32,457.5 shares of stock to Black.

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[15] Seitz v. Michel, 148 Minn. 80, 181 N.W. 102, 105;
Wells v. Dane, 101 Me. 67, 63 A. 324, 325, 326;
Niles v. New York Cent. & H.R.R. Co., 176 N.Y. 119, 68 N.E. 142, 144;
White v. British Type Investors, 130 N.J. Eq. 157, 21 A. 2d 681, 683.

[16] Green v. Victor Talking Mach. Co., 24 F. 2d 378, 380, c.d. 278 U.S. 602;
Stinnett v. Paramount-Famous Lasky Corp., 37 S.W. 2d 145, 149;
Bartlett v. New York, N.H. & H.R.R. Co., 221 Mass. 530, 109 N.E. 452, 453;
Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. 2d 976, 980;
Niles v. New York Cent. & H.R.R. Co., 176 N.Y. 119, 68 N.E. 142, 144;
Baillie v. Columbia Gold Mining Co., 86 Ore. 1, 166 P. 965, 969;
18 CJS, Corporations, § 559, p. 1272.

[17] Oliphant v. Woodburg Coal & Mining Co., 63 Iowa 332, 19 N.W. 212, 214, 215;
Dudley v. Armenia Ins. Co., 115 App. Div. 380, 100 N.Y.S. 818, 820.

JUDGMENT

Eighteenth Day, March Term, Friday, May 4th, 1956.

Before Honorable Orie L. Phillips, Chief Judge, Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby reversed, that these causes be and the same are hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that appellants have and recover of and from appellees their costs herein and have execution therefor.

(802-9)